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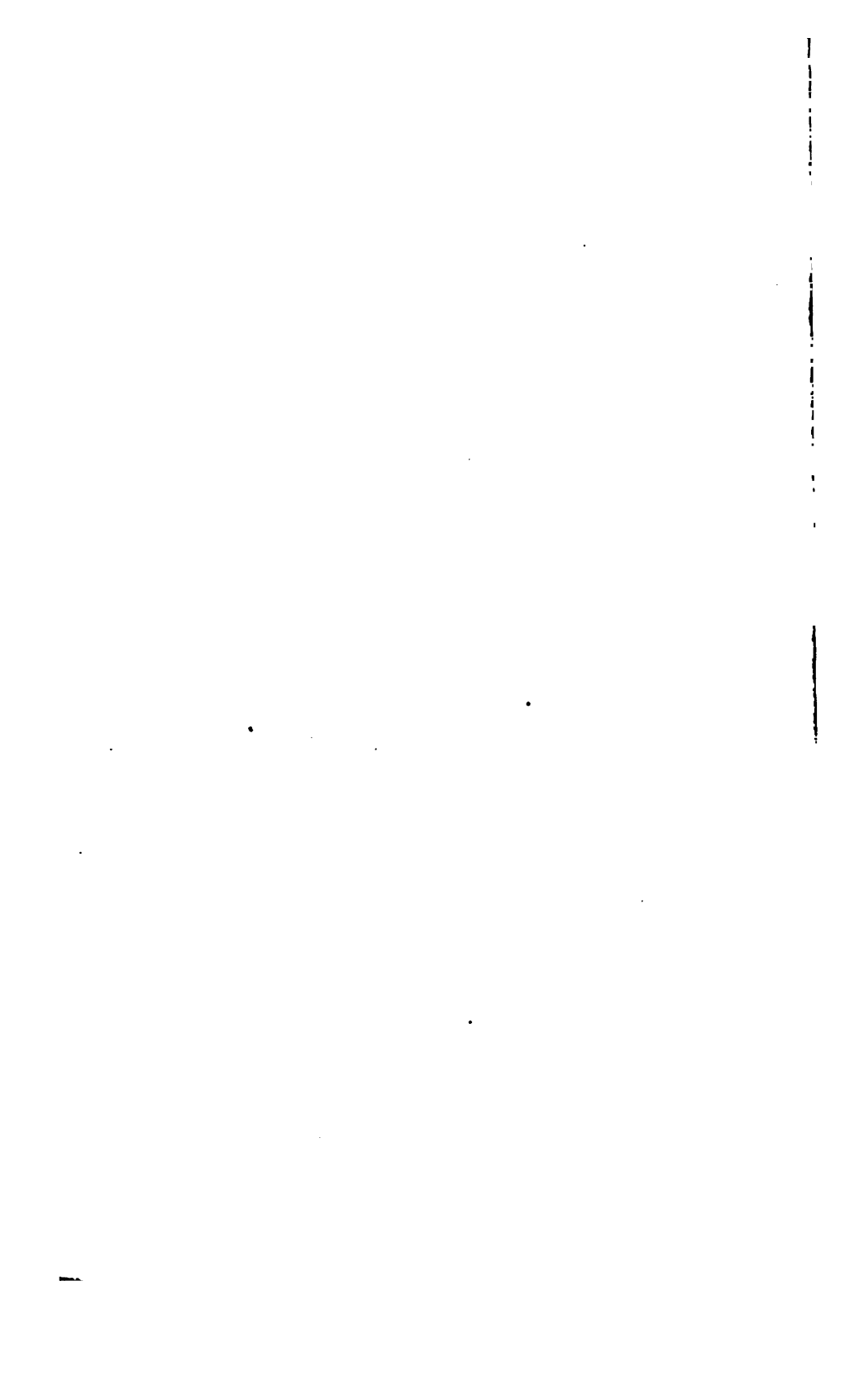
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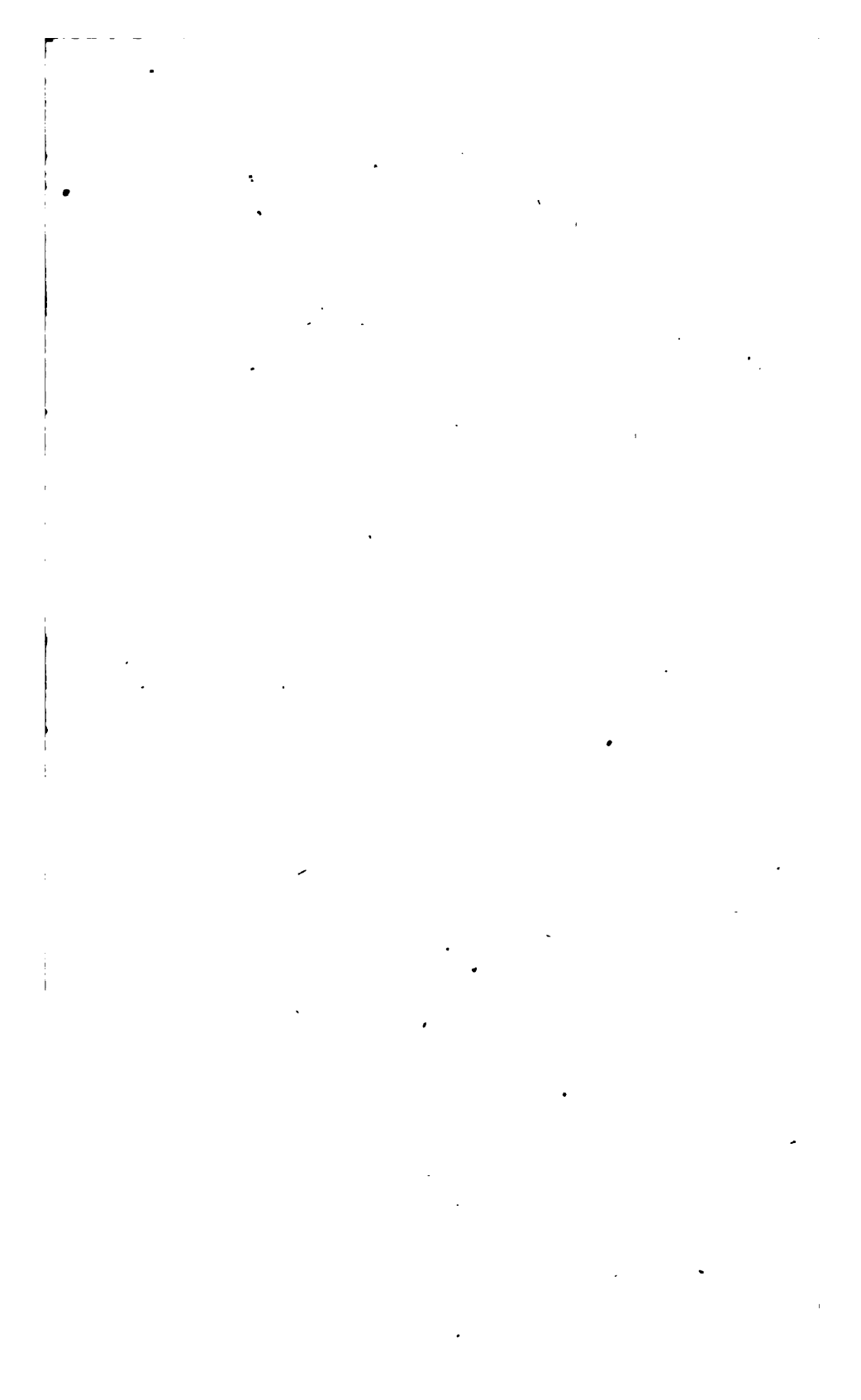
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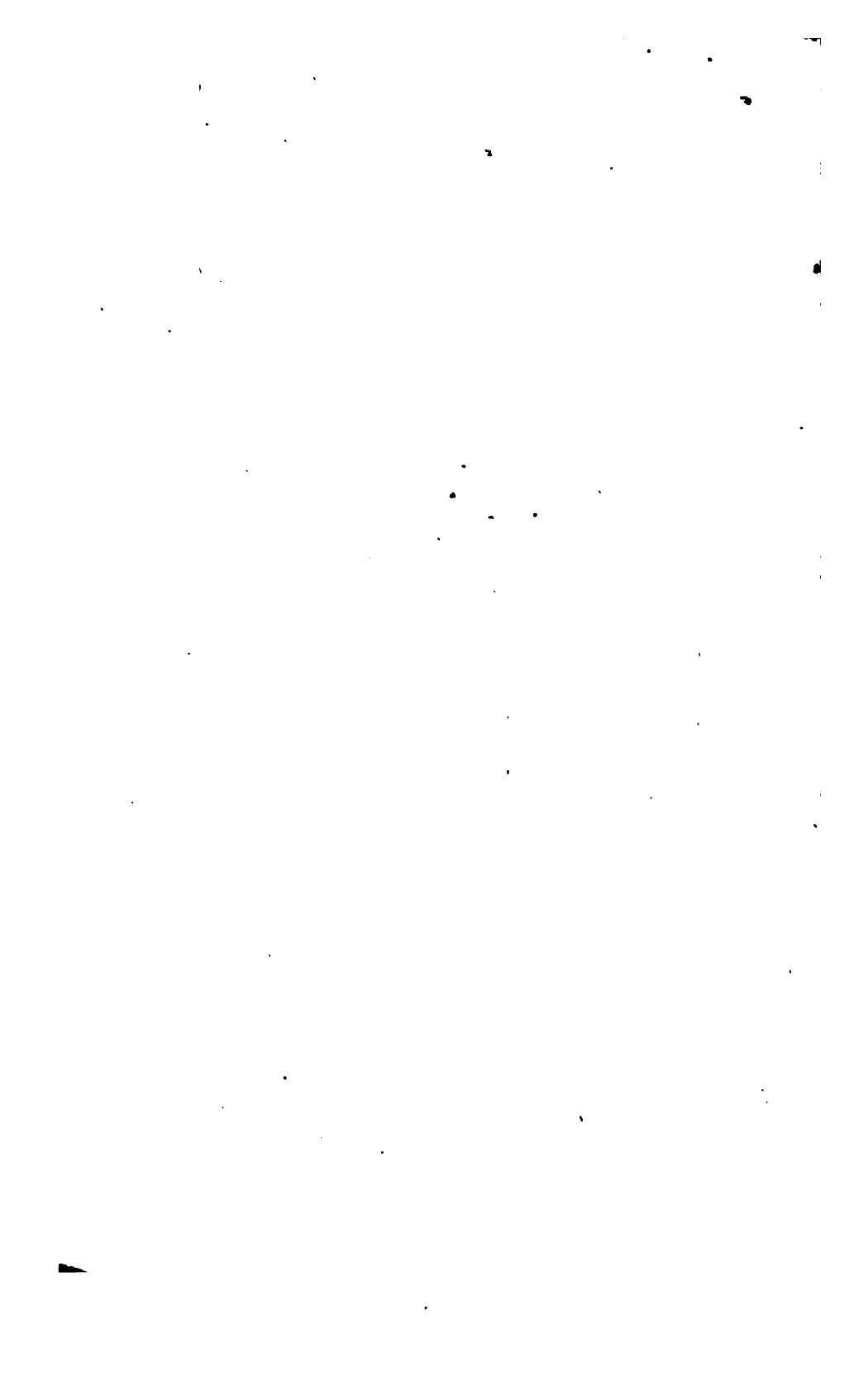
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BJ
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A

TREATISE

ON THE

PRINCIPLES AND PRACTICE

OF THE

HIGH COURT OF CHANCERY,

UNDER THE FOLLOWING HEADS :

- | | |
|-----------------------------|---------------------------------------|
| I. COMMON LAW JURISDICTION. | II. STATUTORY JURISDICTION. |
| II. EQUITY JURISDICTION. | IV. SPECIALLY DELEGATED JURISDICTION. |

Et silicis venis abstrusum excuderet ignem.

BY HENRY MADDOCK, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW.

THIRD AMERICAN,
FROM THE LAST LONDON EDITION.

With the addition of the
PRINCIPAL AMERICAN DECISIONS IN CHANCERY,

UPON THE PLAN OF THE ORIGINAL WORK.

BY THOMAS HUNTINGTON, ESQ.

COUNSELLOR AT LAW.

IN TWO VOLUMES.

VOL. II.

HARTFORD,
OLIVER D. COOKE & CO.

1827.

DISTRICT OF CONNECTICUT, ss.

BE IT REMEMBERED, That on the nineteenth day of June, in the fifty-first
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JNO. BEACH, *Clerk of the District of Connecticut.*

A true copy of Record, examined and sealed by me,

JNO. BEACH, *Clerk of the District of Connecticut.*

TREATISE, &c.

LEGACIES.

AFTER the payment of *Debts*, the next duty of an Executor consists in the payment of *Legacies*.

The principle on which a Legatee is permitted to file a Bill in Equity against an Executor is sometimes said to be founded on the right to a *discovery* of Assets (a) ; but the better opinion seems to be, that it is a consequence of the doctrine, that an Executor is a Trustee (b). It is not a pure trust, otherwise the Ecclesiastical Court, or Courts of Common Law, could never have been applied to for relief in legatory cases.

In very early times there appear to have been Suits in the Court of Chancery for the recovery of personal *Legacies ; [*2 the Lord Chancellor Egerton was of opinion, that the Ecclesiastical Court was more proper to give relief in such cases, and sometimes he would send Parties thither ; but if the Defendant answered the Bill, and took no objections, he would then hear the cause (c). The assertion, therefore, that in the time of Lord Nottingham the Court of Chancery began to exercise a Jurisdiction in respect to Legacies (d) is not quite correct. Certain it is, however, that in Lord Nottingham's time an Executor was considered as a Trustee ; and the opinion then prevailed, that a Legatee is entitled to bring his Bill in Equity against an Executor for his Legacy, upon the foundation, that the office of Executor is a Trust. An Executor is also considered as a Trustee in certain cases for the next of Kin (e) ; and the same doctrine of Trusteeship has been extended to an Administrator, who is also considered as a Trustee for the Parties entitled to Distribution (f).

(a) Keiley v. Monk, 3. Ridgw. P. C. 243. Harrison v. Buckle, 1 Str. 239 ; and see 2 Atk. 363. Jesus Coll. v. Bloom, Ambl. 55. Tomlinson v. Gill, Ambl. 331. Bishop v. Church, 2 Ves. 106.

(b) Wind v. Jekyll, 1 P. Wms. 576 ; and see 7 Ves. 197.

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(c) Nurse v. Groom, M. 9 Jac. cited in Introduction to Prac. of Chancery, p. 50.

(d) In Deeks and Strutt, 5 T. R. 692.

(e) 1 P. Wms. 544. Toller on Executors, p. 480, and see post.

(f) 1 Vern. 133, 4.

After some struggle, it seems now to be exclusively determined, that a *pecuniary* Legacy, though assented to by the Executor, (it is different as to a *specific* Legacy assented to) (*g*) cannot be recovered in a Court of Common Law (*h*) (1) because that Court cannot, like Courts of Equity, oblige a Husband, su-3*] ing for a Legacy in right of his Wife, to make a Settlement;* a reason, it may be remarked, which only extends to that particular class of Legacies.

The Ecclesiastical Court has, as to Legacies, a concurrent Jurisdiction with Courts of Equity (*i*); but the latter are almost always resorted to for relief; because the remedy given by them is more effectual and complete, particularly for payment of Creditors, and concluding all Parties by the Judgment of the Court in the distribution of the effects (*k*). In Courts of Equity, Executors may be compelled to bring in Money acknowledged to be in their hands (*l*); and may be obliged to give security for a Legacy payable at a future day (*m*). (2) So where a Husband claims a Legacy in right of his Wife, he is in Equity, as before observed, compellable to make a Settlement (*n*); and Monies due to infants are in those Courts advantageously laid out and secured: in all which the Ecclesiastical Court is deficient. So, likewise, the Ecclesiastical Court cannot, in any case, compel an Executor to make a distribution of the Residue amongst the next of Kin, because the claim upon him is as a *Trustee* for the next of Kin, and that Court cannot enforce the execution of a Trust (*o*), or as it hath been said, "any thing in the nature of a Trust" (*p*).

Owing, therefore, to the deficiency of Jurisdiction, Suits for Legacies are seldom brought in the Ecclesiastical Court; nor 4*] is it, it seems, an answer to a *Suit in Equity on this subject, that a Suit is commenced in that Court (*o*).

A Legacy of a chattel Interest, whether it be specific or pecuniary, does not vest at *Law* until the Executor assents; but in *Equity* he is compelled to assent (*p*), and will be decreed to deliver the specific Legacies according to the Will.

If in a Will there is a *recital* of a Legacy, but no Legacy has been previously given, it is sufficient Evidence of an intention

(*g*) Doe v. Guy, 3 East, 120.

(*h*) Deeks v. Strutt, 5. T. R. 690. Wright and Rutter, 2 Ves. jun. 676, overruling Hawkes v. Saunders, Cowp. 285. Atkins v. Hill, Cowp. 284; and see what is said in Blount v. Bestland, 5 Ves. 517.

(*i*) Franco v. Alvares, 3 Atk. 346.

(*k*) Redesd. Tr. Pl. 110.

(*l*) Strange v. Harris, 3 Bro. 365.

(*m*) See as to this, ante, 1 Vol. p. 219, &c.

(*n*) See ante, 1 Vol. p. 480, &c. and Anon. 1 Atk. 491.

(*o*) Farrington v. Knightly 1 P. Wms. 559.

(*p*) 3 Atk. 346.

(*o*) See Horrell v. Waldron, 1 Vern. 26, which was a suit by an Executor for his security; but the principle of the decision seems to justify the passage in the text.

(*p*) Day and Trigg, 1 P. Wms. 287.

(1) Vide Boone v. Durand, 1 Des. 588.

(2) Vide Lupton v. Lupton, 2 Johns. Ch. Rep. 614.

to give, and amounts to a Gift ; but before a Legacy is thus allowed by implication, the Court must see very clearly that there is nothing in the Will to which the recital can refer (g).

If a Legacy is given to a Person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the Rule of the Civil Law (r) is adopted, and the Legacy fails (s). (1)

If a doubt be entertained as to a figure in the gift of a Legacy, as whether it be a 3 or 8, a reference will not be made to the Master (t), but an Issue will be directed (u).

Legacies must be paid in the Currency of the Country where the Will is made (x).

*Payment of a Legacy has been presumed after forty-four [*5 years (y) without demand ; so, after forty years (z) ; and even after twenty-five years (a) ; but all the cases, it is said, where that presumption has been admitted, have contained circumstances from which the presumption might arise (b).

Before we proceed to the further consideration of Legacies, it may be proper to make some remarks upon Donations *causa mortis*. There are not many cases on this head. *Donatio causa mortis* is not, in strictness, a Legacy, but in the nature of a Legacy ; and it is not necessary to be proved with the Testator's Will, but it operates as a declaration of Trust upon the Executor (c).

Gifts of this kind are not good unless made by the Party in his last sickness (d) ; nor unless an actual delivery, or some-

(g) *Smith v. Fitzgerald*, 3 Ves. and Bea. 7, 8.

(r) Dig. Lib. 34. tit. 1. l. 72. s. 6. Code, Lib. 6. tit. 42. l. 27. Domat. 2 Vol. 64.

(s) *Kennell v. Abbott*, 4 Ves. 802 ; and see on this subject *Ambl. 756*.

(t) As in *Masters v. Masters*, 1 P. Wms. 421.

(u) *Norman v. Morrell*, 4 Ves. 770.

(x) *Wallis v. Brightwell*, 2 P. Wms. 88. *Phipps v. Earl of Anglesea*, 1 P. Wms. 696. *Saunders v. Drake*, 2 Atk. 465. *Pierson v. Garnett*, 2 Bro. C. C. 41, 2; 47 ; but see as to this Case 10 Ves. 334. *Malcolm*

v. Martin, 3 Bro. C. C. 50.

(y) *Fotherby v. Hartridge*, 2 Vern. 20.

(z) *Jones v. Tuberville*, 2 Ves. jun. 11. S. C. 4 Bro. C. C. 115.

(a) *Dixon v. Dixon*, 4 Bro. C. C. 510.

(b) *Cooper v. Thornton*, 3 Bro. C. C. 96.

(c) *Miller v. Miller*, 3 P. Wms. 358. *Lawson v. Lawson*, 1 P. Wms. 441 ; and see the remark on this Case, 2 Ves. jun. 111.

(d) *Miller v. Miller*, 3 P. Wms. 357. *Blount v. Burrow* 1 Ves. jun. 546.

(1) Though the name of the legatee is wholly mistaken, as *Cornelia Thompson* for *Caroline Thomas*, yet the bequest is good ; and the intention of the testator, and the misnomer being satisfactorily shewn, the legacy will be ordered to be paid to the person intended. *Thomas v. Stevens*, 4 Johns. Ch. Rep. 607.

And where a father was the nominal legatee, and his son was the real object of the testator's bounty, it was resolved, that the father should take the legacy as trustee for the son. *Taylor v. James*, 4 Des. 1.

thing tantamount, is made of the thing by the Party, or by his order (e).

If a Husband upon his death-bed delivers to his Wife a Purse of a hundred guineas, and bids her apply it to her own use, this is *donatio causa mortis*, and effectual, and will not go to the Executors or Administrators of the Husband, if there is sufficient to pay Debts (f).

6*] * A delivery of Receipts from Annuities (South-Sea Annuities, for instance,) is not a sufficient delivery to effectuate a *donatio causa mortis* (g). Such a Donation of Stock or Annuities cannot be made without a transfer, or something tantamount (h).

Delivering the key of a Warehouse (i) or of trunk (k), is considered as a delivery of the contents. (1) So the delivery of Bonds (l), or Bank notes, passes them; but Bills of Exchange, Promissory notes, or checks on Bankers, are said to be incapable of being the subject of such Donations (m), they being only evidence of a Contract (n).

In the construction of Legatory Bequests, it appears to be a rule, borrowed from the Civil Law (o), that where the terms used in a Will are those of *recommendation*, or *precatory*, or expressing *hope* (p), or that the Testator *has no doubt* (q), if the objects with regard to whom such terms are used are *certain*, and the subjects of Property to be given, are also *certain*, the words are considered as imperative, and create a Trust (r.) un-7*] less the Testator shows by *express words, or necessary im-

(e) 3 P. Wms. 358. Ward v. Turner, 2 Ves. 442.

(f) 1 P. Wms. 441; see also 3 P. Wms. 356, a similar case; and see what is said in Ward v. Turner, 2 Ves. 441.

(g) Ward and Turner, 2 Ves 431.

(h) Ibid. 444.

(i) 2 Ves. 434. Toller on Executors, 182.

(k) Ibid. Prec. Ch. 2 Ves. 441. 2 Ves. jun. 116.

(l) Snellgrove v. Bailey, 3 Atk. 214. S. C. mentioned 2 Ves. 442; but see what is said in Miller v. Miller, 3

P. Wms. 358.

(m) Toller on Executors, 182, and 3 P. Wms. 350. 2 Ves. 442. 4 Bro. C. C. 291.

(n) 2 Ves. 442.

(o) Vid. Dig. Lib. 30. T. 1. l. 115, 118, de verbis precariis.

(p) Harland v. Trigg, 1 Bro. C. C. 144.

(q) But see Flanders v. Clarke, 1 Ves. 9.

(r) Paul v. Compton, 8 Ves. 380.

Eales v. England, 2 Vern. 466. Harding v. Glyn, 1 Atk. 469. Pierson v. Garnett, 2 Bro. C. C. 45. S. C. 2

(1) Where A. on his death bed, directed B. to go into his field, to a place pointed out, and take a sum of money there deposited, and in the event of his, A's death, to divide it among A's children, it was decided, that this was not a *donatio causa mortis*. *Windows v. Mitchell*, 1 Murph. 127. But it seems, that there is no difference as to the delivery of the thing, between the case of a *donatio causa mortis* and other parol gifts. Whatever acts shew a parting with the dominion is sufficient, whether the delivery be personal, or by direction of the donor. *McDowell v. Murdock*, 1 Nott and McCord, 237.

plication, that he does not mean to take away a discretion. By the subject of Property being *certain*, is meant, where the whole Property must remain entire during the life of the first person ; for where any power is in that person to diminish the amount, it is uncertain (s). Where, therefore, there was no request to settle the whole Lands, or any particular part, but a power was left in the Devisee to *dispose of, sell, or give away*, the whole Estate in his Life, and *only so much as he should stand seised of at his death*, the Testator requests he should settle, no Trust arises in favour of the object with regard to whom the Trust is made (t). But where a Testator's Will was, "I give to *A. C.* 500*l.* and it is my will and desire that she may dispose of the same amongst her Relations as she by Will may think proper," it was held to be a Trust for the Relations of *A. C.* ; and that the 500*l.* was well bequeathed by *A. C.* to her Sister, and her Sister's Children (u). So where a Testator expressed his will and desire that one third of the principal of his Estate and Effects be left entirely to the disposal of his Wife, among such of her Relations as she may think proper after the death of his Sisters, this was held to be a Trust for her *next of Kin* at the time of her death, she having made no disposition (x). But *where [*8 a Testator devised a Freehold Estate to his Wife, *for her Life*, and then directed that she should dispose of the same amongst the Testator's Children by her, at her decease, as she should think proper, and the Wife made no disposition of the Estate, it was held the Children took no Estate under the Will, but that it went to the Heir at Law (y).

A Legacy to Relations goes to the next of Kin (z), for the objects would be too numerous under a larger construction ; but where a Bequest was to my *nearest Relation*, that carried the Money to a surviving Brother, in exclusion of the Children of a deceased Brother (a).

Words of *entreaty* in a Will raise a Trust although there is a power of selection ; as where the Testator entreated the Leg-

Bro. 226 ; following Harland and Trigg, 1 Bro. C. C. 142, and Wynne and Hawkins, *ibid.* p. p. 179. *Pushman v. Filliter*, 3 Ves. 8. *Malim v. Keighley*, 2 Ves. jun. 333, 529. *Atkins and Wright*, 17 Ves. 225. S. C. on appeal. *Coop.* 116. *Cary v. Cary*, 2 Sch. & Lefr. p. 189.

(s) *Malim v. Keighley*, 2 Ves. jun. 533.

(t) *Bland v. Bland*, 2 Cox, 354, and *Attorney-General v. Hall*, 1735, mentioned 2 Cox, 355.

(u) *Forbes v. Ball*, 3 Meriv. 437.

(x) *Birch v. Wade*, 3. Ves. & Bea. 190.

(y) *Crossling v. Crossling*, 2 Cox. 396.

(z) *Anon.* 1 P. Wms. 327 ; and see *Spring on dem. of Fitcher v. Biles*, in the note to 1 T. R. 118. *Green v. Howard* 1 Ves. jun. 31. *Wright v. Atkyns*, *Coop.* 118. *Pope v. Whitcombe*, 3 Meriv. 689.

(a) *Marsh v. Marsh*, 1 Bro. C. C. 293. *Smith v. Campbell*, before Master of the Rolls, 20th June 1815.

atee to leave the property to the Children or Grandchildren (b).

We shall now proceed to consider the doctrines of Courts of Equity as to, 1. *Specific*, 2. *Vested*, 3. *Lapsed*, and 4. *Conditional*, Legacies.

1. *Specific Legacies* are of two kinds; *First*, When a particular Chattel is specifically described, and distinguished from all other things of the same kind (c), (1) as a Bequest of a sum of Money in such a bag; or of a Bond or other Security; or a be-9*] quest of *Money out of such a Security (d); or Money in Navy Bills (e). *Secondly*, something of a particular species which the Executor may satisfy, by delivering something of the same kind, as a *Horse*, &c. (f). (2)

The first kind may be more properly called an individual Legacy, and if the thing so bequeathed is not found among the Testator's effects it fails; or if given first to *A.* and then to *B.* they must divide it; and if it is disposed of in the Life of the Testator, it is an ademption of the Legacy (g).

A specific Legacy is the same at Law and in Equity, except in the circumstance that at Law any alteration is an ademption; but it is not so considered in Equity, where it is merely for a partial purpose (h). Of ademptions more will be said hereafter.

Specific Legatees have, in some respects, an advantage over those that are pecuniary, so as to be paid *in toto* and not in average, on a deficiency of Assets; but in other respects they are distinguished to their disadvantage from pecuniary Legacies (i); for if Stock specifically given be sold by the Testator, or being a Lease, he is evicted; or, being Goods, be lost or burnt; or, being a Debt, be lost by the Insolvency of the Debtor; in all

- (b) *Prevost v. Clarke*, 2 Madd. Bro. C. C. 160.
 Rep. 458: and see *Browne v. Higgs*, 1 Atk. 416,
 4 Ves. 708. Rehearing, 5 Ves. 495; 417; and see *Simmons against Val-*
 affirmed on Appeal to Lord Chancellor, 8 Ves. 561; and affirmed on Ap- lance, 4 Bro. C. C. 348.
 peal to the House of Lords. (g) *Ibid.*
 (c) *Purse and Snaplin*, 1 Atk. 416. (h) *Arnold against Arnold*, 1 Bro.
 (d) *Lawson v. Stutch*, 1 Atk. 508. C. C. 430.
 (e) *Pitt against Lord Camelford*, 3 (i) *Ashton v. Ashton*, 3 P. Wms.
 385.

(1) Vide *Warren v. Wigfall*, 3 Des. 50.

(2) Vide *Warren v. Wigfall*, 3 Des. 50.

A bequest of 20 negroes, not designated by name, held to be a specific legacy of the second class, and liable to abate with pecuniary legacies.—*Warren v. Wigfall*, *ut supra*. But a bequest to a wife, in these words, "I leave her the whole property she brought me (except two negro slaves, *John* and *Maurice*), to her and her heirs forever," was held to be specific, and protected from abating with the pecuniary legacies. *Ib.* 47.

So, a bequest in these words, "I give, devise and bequeath to my wife *A.* the annual sum of 300*l.* sterling, each and every year during her natural life, in order that she may live in quiet and easy circumstances," and which, with other legacies given to her, was expressed to be in full of her right of dower, was held to be specific, and not liable to abate, even in favour of other specific legacies. *Loock v. Clarkson*, 1 Des. 471. Vide *Stuart v. Carson's Exrs.* 1 Des. 500.

these cases such specific Legatee is not entitled to Contribution from the other Legatees, and, therefore, pays no Contribution towards them (*k*). The Courts, therefore, lean against *con- [*10 struing a Legacy to be *specific* (*l*); (1) since, contrary to the probable intention of the Testator, it often proves a hardship upon the specific Legatee, who by an alteration of a part of the Property, may find nothing that answers the description (*m*); and it often proves hard also upon other Legatees where there happens to be a deficiency. It is a rule, therefore, that no Legacy is to be held specific unless clearly so intended. (2)

In those cases of demonstrative Legacies, where a sum of Money is given out of a particular Fund, the Court is always desirous of construing it as a general Legacy, and the particular Fund referred to only as that out of which in the first place the Testator meant it to be paid (*n*), (3) and not to follow the fate of that particular Fund: and such Legacies are considered as specific only as to the Legatee, so that it shall not abate (*o*); but whenever there is a Legacy of money out of a particular Fund, unless the security is referred to only as the most convenient mode of paying it out of the Assets, it is as much specific as a Legacy of a Horse, a Cow, or any moveable chattel (*p*).

The Court determines upon the face of the Will, whether the Legacy is specific or pecuniary, and does not, it seems, look into the account of the Effects to see whether that shall be turned into a specific Legacy, *which upon the face of the [*11 Will is to be taken as pecuniary (*q*). To authorize a departure from the words of the Will, it is not enough to doubt whether they were used in the sense which they properly bear, but the Court ought to be quite satisfied that they were used in a different sense, and ought to be able distinctly to say what the sense is in which they were meant to be used (*r*).

A *Specific Legacy* vests immediately upon the death of the

(*k*) Long and Short, 1 P. Wms. 403; and see 2 Black. Com. p. 512.

(*l*) Ellis against Walker, Ambl. 310; and see Webster v. Hale, 8 Ves. 413. *Simmons* against Vallance, 4 Bro. C. C. 349.

(*m*) See Sibley v. Perry, 7 Ves. 529; and see Ashburner v. M'Guire, 2 Bro. C. C. 108.

(*n*) See Ellis against Walker, Ambl. 310. Chaworth v. Beech, 4 Ves. 565. Roberts v. Pocock, *ibid*. 150. Coleman v. Coleman, 2 Ves. jun. 639.

(*o*) Coleman v. Coleman, 2 Ves. jun. 640.

(*p*) Chaworth v. Beech, 4 Ves. 566, 7; and see Innes v. Johnson, 4 Ves. 555.

(*q*) Innes v. Johnson, 4 Ves. 573. *Sed vid.* Fonnereau v. Pointz, 1 Bro. C. C. 472, and Page v. Leapingwell, 18 Ves. 463. With respect to Fonnereau and Pointz, the late Master of the Rolls seems not to have approved of the decision, for in Attorney-General v. Grote, 3 Meriv. 349, he says, "In a case precisely the same, I might be disposed to follow that Precedent."

(*r*) Attorney-General v. Grote, 3 Meriv. 321.

(1) Vide Cogdell v. Cogdell, 3 Des. 373.

(2) Vide Walton v. Walton, 7 Johns. Ch. Rep. 258. Cogdell v. Cogdell, *ut supra*.

(3) Vide Cogdell v. Cogdell, *ut supra*.

Testator, and, unlike a *pecuniary* Legacy, carries interest from his death (s).

Some very nice distinctions have been made in regard to what is, or is not, a Specific Legacy.

Legacies of Stock are usually considered as *general* Legacies, and not specific, unless there is any thing in the Will to show that the Testator intended to confine it to the Stock he has at the time of his death (t). (1)

In some cases it seems to have been considered, that where a Testator has *more* Stock than that which he bequeaths, the Legacy is *specific*; from the absurdity of supposing that the Testator did not give out of what he possessed, but that the Executors should purchase (u); but in a subsequent case (x) the Court 12*] *held there must be something more than Stock enough to make it *specific*.

If a Legacy be of 100*l.* long Annuities Stock (y); or "*of my Stock*" (z), or "*in my Stock*," or "*part of my Stock*," the Legacy is *specific*; but a Gift of "1000*l.* out of reduced Bank Annuities," is a *pecuniary* Legacy (a); and so where there was a Legacy of Stock in the 4 per Cent. Consols, a Legacy to the same Person of "an additional sum of 2,000*l.* more to be paid out of the 4 per Cents," was held to be a *pecuniary* Legacy (b); and even a Bequest of "12,000*l.* of my funded Property to be transferred," &c. was held to be a *pecuniary*, and not a *specific* Legacy (c).

Lord Camden was of opinion (f), that if a sum of Money be given, 500*l.* for instance, "due on a Bond from A." the Legacy is not specific; Lord Thurlow held differently (g), and consider-

(s) *Barrington v. Tristram*, 6 Ves. 345.

(t) *Avelyn v. Ward*, 1 Ves. sen. 425. *Purse v. Snaplin* 1 Atk. 414; and see *Sleech v. Thorington*, 2 Ves. 562, &c.

(u) See *Ashton v. Ashton*, For. 152. S. C. MS. and in 3 P. Wms. 384. In the MS. note of this Case it appears the Testator used the words, "his stock," which makes it a clear case.

(x) *Simmons against Vallance*, 4 Bro. C. C. 249. *Blackshaw v. Rogers*, cited 4 Bro. C. C. 349.

(y) *Attorney-General v. Grote*, 3 Meriv. 316.

(z) See *Ashburner v. M'Guire*, 2 Bro. C. C. 112; and see *Aston* and

Aston, MS. Mich. 9 Geo. 2. 1735. S. C. For. 152.

(a) *Kirby v. Potter*, 4 Ves. 748; but see Lord Eldon's expression in regard to this case in *Dean v. Test*, 9 Ves. p. 154.

(b) *Deane v. Test*, 9 Ves. 146; and see *Peterborough against Mortlocke*, 1 Bro. C. C. 565.

(c) *Lambert v. Lambert*, 11 Ves. 607; and see *Kirby v. Potter*, 4 Ves. 752, and *Sibley v. Perry*, 11 Ves. 522. *Wilson v. Brownsmith*, 9 Ves. 180 which seem to overrule *Aston v. Aston*, For. 152 S. C. MS.

(f) See *Attorney-General v. Parkin*, Ambl. 566.

(g) *Ashburner against M'Guire*, 2 Bro. C. C. 111.

(1) A bequest of all the testator's right, interest and property in 30 shares of the bank of the *United States*, held to be a *specifick* legacy. *Walton v. Walton*, 7 John's. Ch. Rep. 258.

ed the distinction as too slender; but *Lord Camden's* Judgment has since been sanctioned (*h*).

If a Testator gives Stock which he does not possess, *the [*13 Legatee is entitled to have so much Stock purchased (*i*); nor is evidence admissible to show there was a mistake in the Will as to the Fund (*k*).

It is observable that if a Legacy is given of so much Bank Stock, it does not pass an additional capital given by the Bank subsequent to the Will and before the Testator's death, in respect of the Stock, under the power contained in the 56 Geo. 3. c. 96 (*l*).

A Legacy of 50*l*. for a Ring is not a specific Legacy (*m*); and if Bank Annuities be directed by Will to be purchased out of personal Estate it is considered as a pecuniary Legacy (*n*).

If there be a specific Legacy of Bank stock, and the clause of the Will giving the specific Legacy is set forth to the Bank, they will take care of the Interest of the specific Legatee; but if that is omitted, it is at the peril of the Party, and the Bank transferring to the Executor would stand discharged (*o*).

2. With respect to *vested Legacies*, it is to be observed, that the Court favours the vesting of Interests (*p*), and more especially of a *residuary Bequest*, in order to prevent an Intestacy (*q*). The first mention of the doctrine of Legacies vesting or not, appears to have been in a Case in the *Year Book*, 24th *Hen. 8 (*q*), followed by a case in *Dyer* (*r*), which has been erroneously supposed (*s*) to be the first case on the subject. It is, with some exceptions, an established Rule, borrowed from the Civil Law (*t*) (though never treated with much respect) (*u*), that if a Legacy be bequeathed to one generally, *to be paid*, or *payable* at the age of twenty-one, or any other age, and the Legatee die before that age, this is such an Interest vested in the Legatee that it goes to his Executor or Administrator; it being *debitum in presenti*, though *solvendum in futuro*, the time being annexed to the *payment*, and not to the *Legacy* itself; but if a Legacy be bequeathed to the Legatee *at* twenty-one; or *if*,

(*h*) Vid. what is said in *Coleman v. Coleman*, 2 Ves. Jun. 640; and in *Chaworth v. Beech*, 4 Ves. 566; and see 4 Ves. 150, 748. 9 Ves. 360. 15 Ves. 384; but see *Acton v. Acton*, 1 Meriv. 173.

(*i*) *Mann v. Copland*, 2 Madd. Rep. 223.

(*k*) *Chambers v. Minchin*, 4 Ves. 577.

(*l*) *Norris v. Harrison and others*, 2 Madd. Rep. 268.

(*m*) *Apreece v. Apreece*, 1 Ves. and Bea. 364.

(*n*) *Gibbons v. Hills*, 1 Dick. 324.

(*o*) *Hartge v. The Bank of Eng-*
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land, 3 Ves. 58; see what is said in *Bank of England v. Lunn*, 15 Ves. 579, 80.

(*p*) *Prescott v. Long*, 2 Ves. 690.

(*q*) *Bolger v. Machell*, 5 Ves. 509. *Booth and Booth*, 4 Ves. 407. *Leake v. Robinson*, 2 Meriv. 386, where the preceding case is observed upon.

(*r*) Mentioned Bro. Tit. "Devise," fol. 7.

(*s*) 59b.

(*t*) 1 Cox's Rep. 21.

(*u*) Code, Lib. 6. Tit. 53. s. 5.

(*v*) See *Mackell v. Winter*, 3 Ves. 543.

or when, or provided, he shall attain twenty-one, and the Legatee die before that age, the Legacy is lapsed (x); and that whether the Legacy be of Money, a Chattel, a Partnership, or the profits of a trade (y). Legacies expressed in such terms are construed in a different manner from what the same words are when applied to Real Estate; for where there is a Devise of real Estate to A. when he attains twenty-one, the Estate vests immediately, and the dying under twenty-one is considered as a condition subsequent, on which the Estate is to be divested (z).

15*] *Where a Legacy out of personal Estate has been given "at" or "after the Death" or, "at the decease" of a particular person, it has been held not to denote a condition that the Legatee shall survive such persons, but only to mark the time, at which the Legacy shall take effect in Possession; that Possession being deferred on account of some Interest in the subject being given to the Person on whose death the Gift is to take effect (a); but wherever a Legacy is given, not as an independent Bequest, with a time for payment or distribution, appointed afterwards, but where the time is annexed to the substance of the Bequest, the Interests do not vest before that period (b).

A Legacy to Daughters, equally to be divided between them when they arrive at twenty-four years of age, has been held to vest immediately, and only the time of payment postponed (c); but though it vests immediately, and in case of the death of either Legatee would go to her Executors or Administrators, yet they cannot claim the legacy until such time as the Infant Legatee would have attained twenty-four (d), unless the whole Interest is given in the mean time (e).

16*] *It is different where a Bequest is of a Legacy to an Infant at his age of twenty-one years, and if the Infant dies before twenty-one, then to J. S. in such case on the death of the

(x) See 2 Vern. 199. 3 Ves. 15; see Attorney-General v. Milner, 3 Atk. 114. Stapleton v. Cheales, Prec. Ch. 317. Monkhouse v. Holme, 1 Bro. C. C. 298, and Hanson v. Graham, 6 Ves. Jun. 239. Gose v. Nelson, 1 Burr. 226.

(y) Atkinson v. Turner, 2 Atk. 41. S. C. Barn. 74.

(z) Mansfield v. Dugard, 1 Eq. Ca. Abr. 195. Edwards v. Hammond, 3 Lev. 132. Goodtitle v. Whitby, 1 Burr. 228. Pearce v. Loman, 3 Ves. 135. Broomfield v. Crowder, 1 New Rep. 313. Doe, Lessee of Hunt and others, against Moore and others, 14 East, 601.

(a) Hatch v. Mills, 1 Eden, 342.—Blamire v. Gildart, 16 Ves. 316; and see Barnes and Allen, 1 Bro. C. C.

181. Monkhouse against Holme, ibid. 298. Attorney-General against Crispin, ibid. 386, and Benyon v. Maddison, 2 Bro. 75, there cited; and see Molesworth and Molesworth, 4 Bro. C. C. 408. Roebuck and Dean, ibid. 403. Bayley v. Bishop, 9 Ves. 6. Balmmain v. Shore, 9 Ves. 507.

(b) Sansbury v. Read, 12 Ves. 78; see Spink against Lewis, 3 Bro. C. C. 355. Batsford v. Kebbel, 3 Ves. 363.

(c) May against Wood, 3 Bro. C. C. 471.

(d) 2 Vern. 94, 199. Laundry v. Williams, 2 P. Wms. 480. Chester v. Painter, 2 P. Wms. 336, 7. Roden against Smith, Ambl. 588.

(e) Ambl. 583.

Infant before twenty-one the gift to J. S. takes place immediately, as a new substantive Bequest (e). But the mere circumstance of all the shares being given over on a contingency, does not, of itself, and without more, prevent any of the Shares from vesting in the mean time, if the words of the Bequest be, in other respects, sufficient to pass a vested Interest; but such Bequest over of the entirety may be called in aid of other circumstances, to show that no present Interest was intended (f). If a share once vests, though liable to be divested on a contingency, the question of reciprocal succession or survivorship never can arise. If the contingency happens, the share goes over; if it does not happen, the share remains vested, and passes to representatives (g).

Though in general, where a legacy is to be paid at a particular day, it is vested, and the time of payment only is postponed; yet there is no case where the Court has held a Legacy or Interest therein to be vested, where the *certainty* of the sum given could not be predicated (h).

Where there is a clear vested Interest, subject to be *de- [*17 vested in a given event, unless that event happens the Representatives of the Legatees are entitled (i).

The giving of *Interest* on a Legacy to a Legatee, let the Interest be ever so small (k), or a provision for his maintenance, until the time for payment of the Legacy (l), provided it be equal in amount to the Interest (m), vests the Legacy; but not, it seems, where the Legacy is payable out of *Land* (n), much less where any thing appears on the Will to show the Legacy was not intended to vest (o).

So where personal Property is given to one for Life, and after his decease to another, this is a vested Interest in the second taker; and though he dies in the Life-time of the first taker, his Representatives are entitled to the Legacy when it becomes due (p).

(e) *Laundy v. Williams*, 2 P. Wms. 480. *Papworth v. Moore*, 2 Vern. 283. *Roden against Smith*, Amb. 588.

(f) *Skey v. Barnes*, 3 Meriv. 334, in which case the reasoning in *Scott v. Bargeman*, 2 P. Wms. 69, is objected to, see p. 341; and see *Ingram v. Shephard*, Amb. 448.

(g) 3 Meriv. 343.

(h) *Maddison v. Andrew*, 1 Ves. 59.

(i) *Smither v. Willock*, 9 Ves. 234. *Harrison v. Foreman*, 5 Ves. 207.

(k) *Clobery's case*, 2 Ventr. 342. S. C. 2 Chan. Cas. 155. *Saunders v. Earle*, 2 Ch. Rep. 98. Anon. 2 Vern. 199. *Fonneran v. Fonneran*, 1 Ves. 118. S. C. 3 Atk. 645. *Walcott*

against *Hall*, 2 Bro. C. C. 305. *Hanson v. Graham*, 6 Ves. 249.

(l) *Hoath v. Hoath*, 2 Bro. C. C. 3. *Green against Pigot*, 1 Bro. C. C. 105. *Roden v. Smith*, Amb. 588.

(m) 3 Bro. 416.

(n) *Gawler and Standewicke*, 1 Bro. C. C. 106, in note. S. C. 2 Cox, 15.

(o) *Fonneran v. Fonneran*, 3 Atk. 645. S. C. 1 Ves. 118.

(p) See *Dawson v. Killett*, 1 Bro. C. C. 123. 4. *Molesworth v. Molesworth*, 4 Bro. C. C. 408. *Robuck v. Dean*, ibid. 403. *Wadley v. North*, 3 Ves. 364. *Monkhouse v. Holmes*, 1 Bro. C. C. 298. *Walker v. Shore*, 15 Ves. 122; and see *Hixon and Oliver*, 13 Ves. 109.

Where a Legacy is given to take effect at an *indefinite period*, it will be considered as vested at the death of the Testator (q); and the use of such words as "*when received*," "*when got 18**" in, "*when recovered*,"* "*when laid out*," do not so clearly mark the intention as to preclude the application of the legal presumption (r). If, however, the intention is clearly expressed it must be carried into execution (s); but the Court will not conjecture in favour of an Intention against the general Rule (t).

A Legacy to the Children of Husband and Wife is confined to Children born at the Testator's death (u). So a devise to the younger Children of the Testator's Son, to be paid at twenty-one, vests in those born at the death of the Testator (x).

The Law sees no impossibility of having Children at any number of years; and the not keeping demands of this sort open has induced the Court to confine these Bequests to such Children as were in being at the death of the Testator, at which time the number is known, and the proportion they are entitled to, and at the time when to receive it (y).

A Legacy to A. for life, and to her Children at her decease, vests in all the Children as they come *in esse*, unless there are circumstances to show that not to be the intention (z).

But a Legacy to the Children of A. at twenty-one, and if any 19*] die before that age their share to go to the *Survivors, does not give a vested Interest; and a Child born after the Testator's death, but during the Infancy of the others, is entitled to a share (a). It would be different if instead of a gross sum given among the Children in this case, a sum of 50*l.* had been given to each of the Children, for then, if the same rule prevailed, the distribution of the personal Estate must have been postponed, as it could not have been divided until it was known how many Legacies of 50*l.* were payable (b).

Where a Testator gave to each and every of his Children born, or thereafter to be born, and who should be living at the time of his death, 5,000*l.* a piece to be paid at their ages of twenty-one, &c. with interest from the day of his death, a Child,

(q) *Hutcheon v. Manning*, 4 Bro. C. C. 491, in note, and S. C. by mistake called *Hutchin v. Mannington*, 1 Ves. Jun. 366; and see S. P. *Stapleton v. Palmer*, 4 Bro. 590, and *Gaskell v. Harman*, 11 Ves. 489.

(r) *Wood v. Penoyre*, 13 Ves. 336, and *Hambling v. Lyster*, there mentioned, and S. C. but not so full in *Ambly*. 401.

(s) *Elwin and Elwin*, 8 Ves. 547.—*Innes and Mitchel*, 6 Ves. 461; and see what is said of that case 11 Ves. 506, and in *Wood and Penoyre*, 13 Ves. 336. See also *Bernard, v. Mountague*, 1 Meriv. p. 422.

(t) *Gaskell v. Harman*, 11 Ves. 498. 506, and the case there noticed of *Innes v. Mitchell*, 6 Ves. 461.

(u) *Heathe v. Heathe*, 2 Atk. 122.

(x) *Horsley v. Chaloner*, 2 Ves. 13.

(y) 2 Ves. 84; also *Hales v. Currat*, Mich. 6. Geo. 2. 1732. MS. contra *Dennison v. Pocklington*, Hil. 1714. MS.

(z) *Spencer v. Bullock*, 2 Ves. 687.

(a) *Gilmore against Severn*, 2 Bro. C. C. 582; and see *Congreve v. Congreve*, 1 Bro. C. C. 530.

(b) *Ringrooe v. Bramham*, 2 Cox, 384.

en ventre sa mere, was held entitled to a Legacy of 5,000*l.* but the Interest to be computed only from its birth (c).

It is observable of Legacies, that if once a share has survived it will not survive again without express words (d); if, therefore, the Testator gives a Sum, suppose 1,000*l.* to be divided amongst four persons as *Tepants* in Common, and that if one of them die before twenty-one, or Marriage, that it shall survive to the others; if one dies and three are living, the share of that one so dying will survive to the other three, but if a second dies, nothing will survive but the second's **original* [*20 share, for the accruing share is as a new Legacy, and as to that there is no survivorship; but a Man, no doubt, may make his Will so that what is originally given, and what accrues by others death, shall go to the Survivors (f), and such words skilful Conveyancers always take care to supply. But though the Rule be, that where there are not particular words used for the purposes, surviving shares will not survive again, and that, though the original shares would go over, those which accrued by survivorship would be vested Interests in the Children dying, and transmissible to their Representatives, yet that Rule has been much disapproved of, and the Court has anxiously availed itself of any expressions in the Will manifesting an intention, inconsistent with the operation of the Rule (g); and where the Legacies were not separate and distinct, but given out of an aggregate Sum, the Rule was held not to apply (h).

In those cases where a Legacy is considered as vested, though liable to be divested, the effect is, that in case of the death of a Child under the age of twenty-one, the produce, at least the Interest accrued from the death of the Testator, would go to that Child, though it would take nothing in the Capital (i).

If there be a Legacy to the Testator's three Children, to be equally divided between them, share and share alike, but in case of the death of any without being married, and having Children, the share of such **Child* so dying to be divided between the [*21 surviving Children; if one only should survive, or if one Child marries and has a Child, its share is considered as *vested* (k).

If a Testator has appointed any time subsequent to his death, fixing the share each Child is to take, that excludes those born

(c) *Rawlins v. Rawlins*, 2 Cox. 425.
(d) *Ex parte West*, 1 Bro. C. C. 575. *Pain v. Benson*, 3 Atk. 80.
Bargrave v. Whitwick, 2 Chan. Rep. 131. *Rudge v. Barker*, For. 124.
Ferguson v. Dunbar, 3 Bro. C. C. 469, in note. *Vandergucht v. Blake*, 2 Ves. jun. 534.

(e) *Pain v. Benson*, 3 Atk. 80.—
Rudge v. Barker, For. 124.

(f) As in *Paine v. Benson*, 3 Atk. 78.

(g) *Ibid.*

(h) *Worlidge v. Churchill*, 3 Bro. C. C. 465.

(i) *Vid. Chaworth v. Hooper*, 1 Bro. C. C. 81. *Deane v. Test*, 9 Ves. 152, 3; and *vid. Lady Lincoln v. Lord Pelham*, 10 Ves. 175.

(k) *Bell v. Phyn*, 7 Ves. 453.

after that time (*l*). Thus where there was a Bequest to "all the Children of *A.* as they shall severally attain sixteen;" those born after the eldest attained sixteen were excluded (*m*).

Under a *Marriage Settlement* the construction is different and such words are construed to mean "all Children;" and it has been lamented that a different construction has prevailed as to *bequests* (*n*).

Where a Legacy is given to all the Children of *A. B.* it does not extend to after born Children; but where it is given with any suspension of the time, so as to make the gift take place either by a fair, or even by a strained, construction (for so far some of the Cases go), at a future period, then such Children will take as are living at that period; and small circumstances have made the difference (*o*). Thus, where a Testator gave the residue of his real and personal Estate to his wife for Life, and upon her decease he bequeathed it to the Children of *A.* and 22*] his Wife Jane, equally to be *divided amongst them the said Jane's Children, and not to any other Children by any other marriage of either party, the residue was held divisible amongst the Children of *A.* and *Jane* who were living at the death of the Testator's Wife, but did not extend to Children born after that time (*p*).

If a Legacy be to the Children of *A.* after the death of *B.* those born before the period of distribution will take, unless some other time is expressly provided (*q*); excluding all who may afterwards come into existence (*r*), and they are *vested* Interests (*s*); and any Child coming *in esse* before a determinate share becomes distributable to any one, is included (*t*); even a Child by a *second marriage* (*u*).

An illegitimate Child, it must be remembered, cannot take by prospective Bequest made before its birth (*x*).

(*l*) *Ellison v. Airey*, 1 Ves. sen. 111. In *Hill and Chapman*, 1 Ves. jun. 408; Lord Thurlow says of that case, "it went on a refinement, but cannot be shaken."

(*m*) *Hoste v. Pratt*, 3 Ves. 730, and *S. P. Andrews v. Partington*, 3 Bro. 401. *Pulford* against *Hunter*, *ibid.* p. 419. *Prescott v. Long*, 2 Ves. jun. 690.

(*n*) See *Andrews v. Partington*, 3 Bro. C. C. 404; see also *Prescott and Long*, 2 Ves. jun. 692; and see what is said in *Hill and Chapman*, 1 Ves. jun. 407.

(*o*) *Singleton v. Gilbert*, 1 Cox, 72; and see *Jee v. Audley*, 1 Cox, 324.

(*p*) *Ayton v. Ayton*, 1 Cox, 397. *S. C.* 1 Bro. C. C. 542, in note.

(*q*) *Hughes v. Hughes*, 3 Bro. C. C. p. 352, 355. *Godfrey v. Davis*, 6

Ves. 49. *Devisme v. Mello*, 1 Bro. C. C. 537.

(*r*) *Walker v. Shore*, 15 Ves. 124; and see *Gilbert v. Boorman*, 11 Ves. 238, and *Godfrey v. Davis*, 6 Ves. 50. *De Visme v. Mills*, 1 Bro. C. C. 537. *Odell v. Crone*, Dom. Proc. 3 Dow. 61. *Viner v. Francis*, 2 Cox, 190. *S. C.* 2 Bro. C. C. p. 658.

(*s*) *Middleton v. Messenger*, 5 Ves. 140.

(*t*) See *Gilbert v. Boorman*, 11 Ves. 238. *Whitbread v. Lord St. John*, 10 Ves. 152. *S. C.* MS. *Prescott v. Long*, 2 Ves. jun. 690. *Andrews v. Partington*, 3 Bro. C. C. 401.

(*u*) *Barrington v. Tristram*, 6 Ves. 349.

(*x*) *Arnold v. Preston*, 18 Ves. 288.

If a Legacy be bequeathed *upon a marriage*, with a given consent, the Legacy does not vest before the marriage (y); because in such cases it cannot be ascertained whether the Contingency will happen (z). *But this doctrine does not apply in the [*23 case of a *residue* bequeathed. Where, therefore, there was a Residuary Bequest to Trustees, upon trust, to pay the Dividends, &c. equally between the Testator's two great Nieces until their respective Marriages, and from and immediately after their respective Marriages, to assign and transfer their respective moieties or shares thereof unto them respectively, it was held to be a vested Interest before marriage (a).

A clause of Survivorship between two Legatees, "*if either of them should die,*" is confined to a case of lapse, and does not prevent the vesting of the Legacies (b).

3. With regard to *lapsed Legacies*, it is a general rule, that (unless it be a joint Legacy which goes to the Survivor (c), or a Tenancy in common with a Bequest over to the Survivor) (d), if a Legatee die in the Life-time of the Testator the Legacy is *lapsed*; a Rule adopted, probably, from the Civil Law (e), and the rule is the same though the Will be made in execution of a Power (f); but if the Legatee be dead at the time of making the Will, this is not considered as a lapsed Legacy falling into the *residuum* (g).

A Testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear (h). A Legacy, *though expressed to be to A. [*24 and his *Representatives*, will lapse by the death of A. in the Life-time of the Testator (h), in the same manner is if an Estate be given to A. and his Heirs, and A. dies in the Life-time of the Testator, his eldest Son cannot take the Estate (i). So a Legacy to an Executrix, or to her Heirs, Executors and Administrators, lapses by the death of the Executrix in the Testator's life (k); and if a Legacy be to one for Life, and after the death of that Person to several others, and in case of their deaths to their

(y) Garbut v. Hilton, 1 Atk. 381.
Atkins v. Hiccocks, *ibid.* p. 500.

(z) Elton v. Elton, 3 Atk. 507. S. C. 1 Ves. 61 Serjeant Wilson's Rep. 159.

(a) Booth v. Booth, 4 Ves. 399. See the observations on this case in Leake, v. Robinson, 2 Meriv. 386.

(b) King v. Taylor, 5 Ves. 806.

(c) 3 P. Wms. 113; and see Humphrey v. Tayleur, Ambler. 136. Dowset v. Sweet, *ibid.* 175.

(d) Miller and Warren, 2 Vern. 207.

(e) Inst. Lib. 2, Tit. 21, in principle. 4.

(f) Oke v. Heath, 1 Ves. 135.—Duke of Marlborough v. Lord Go-

dolphin, 2 Ves. 73.

(g) Morgan v. Searle, 11th July 1763. MS. in Cox's notes in Linc. Inn Library.

(h) Corbyn v. French, 4 Ves. 435.

(i) Elliot v. Davenport, 1 P. Wms. 83. S. C. 2 Vern. 521. Maybank v. Brooks, 1 Bro. C. C. 84. A doubt, however, was expressed on the subject in Corbyn v. French, 4 Ves. 435; and see Bridges v. Wood, mentioned in Mr. Raithby's valuable Edition of Vernon, 2 Vol. p. 378, note 1.

(j) Sic dict. Toplis v. Baker, 2 Cox, 121.

(k) Stone v. Evans, 2 Atk. 84. Tydwell v. Ariel, 3 Madd. Rep. 403.

Representatives, and one of the Legatees dies in the Life of the Testator, the Legacy lapses (*l*). But if a Person says in his Will, "*I forgive such a Debt*," or that "*that my Executor shall not demand it*," or "*shall release it*," this, it seems, is a discharge of the Debt, though the Debtor dies in the Life-Time of the Testator (*m*); and it is a general rule that a Trust Legacy does not lapse by the death of the Trustee in the Testator's Life-time, but that it survives for the benefit of the *Cestui que Trust* (*n*).

A Testator may, if he pleases, prevent a Legacy from lapsing; but to do so the Will must be specially penned (*o*); and 25*] the Testator must not only declare that *the Legacy shall not lapse, but he must likewise mention the Person who is to take it (*p*).

If a Legacy of 500*l.* be given to *A.*, and if *A.* die before twenty-one, then to *B.*, and *A.* die before twenty-one in the Testator's Life-time, this is not wholly a lapsed Legacy, but goes over to *B.* (*q*).

It is a general rule ever since the case of *Pawlet v. Pawlet* (*r*), followed by a multitude of cases (*s*), that where Money is given to be paid *at a future time*, (for if payable, *presently*, the rule cannot apply) (*t*), out of a real Estate, and the Legatee dies before the time, it sinks into the Estate (*u*); and the same rule prevails where a Legacy is charged on real Estate *to be purchased* with the residue of a personal Estate (*x*).

And whether the Legacy be given by a Parent (*y*), or a Stranger (*z*), charged upon Land primarily, or as auxiliary to the

(*l*) 4 Ves. 435.

(*m*) *Elliot v. Davenport*, 2 Vern. 522. S. C. 1 P. Wms. 83; and see *Sibthorpe v. Moxon*, 3 Atk. 579. S. C. 1 Ves. 49; and in 1 Serj. Wilson's Rep. 178; and see this Case mentioned in *Toplis v. Baker*, 2 Cox. 121.

(*n*) *Moggridge v. Thackwell*, 1 Ves. jun. 475. *Oke v. Heath*, 1 Ves. 140; but see *Eacles v. England*, 2 Vern. 468. S. C. Prec. C. 200.

(*o*) 3 Atk. 582. *Toplis v. Baker*, 2 Cox. 121.

(*p*) *Bridge against Abbot*, 3 Bro. C. C. 225. *Sibley v. Cooke*, 3 Atk. 572. *Willing v. Baine*, 3 P. Wms. 113. *Darrell v. Molesworth*, 2 Vern. 378.

(*q*) *Northey v. Strange*, 1 P. Wms. 343.

(*r*) 2 Ventr. 366, and S. C. 1 Vern. 204, 321, and S. C. 2 Ch. Rep. 204.

(*s*) *Hodgson v. Rawson*, 1 Ves. 47. *Boycott and Cotton*, 1 Atk. 556, overruling *Cave v. Cave*, 2 Vern. 508.

Prec. Ch. 201. *Yates and Fettiplace*, 2 Vern. 416. *Duke of Chandos v. Talbot*, 2 P. Wms. 613, and Mr. Cox's note, so much praised by Lord Rosslyn, 3 Ves. 138. Attorney-General and Milner, 3 Atk. 115. *Prince v. Loman*, 3 Ves. 138. *Codrington and Lord Foley*, 6 Ves. 333. The case of *Jackson and Ferrand*, contra, 2 Vern. 424, Lord Hardwicke calls an anomalous case, 1 Atk. 486.

(*t*) *Wilson and Spencer*, 3 P. Wms. 172.

(*u*) *Hall v. Terry* 1 Atk. 503. and see *Van v. Clarke*, 1 Atk. 512. *Gordon v. Raynes*, 3 P. Wms. 138. *Smith v. Smith*, 2 Vern. 92.

(*x*) *Harrison v. Naylor*, 2 Cox, 247.

(*y*) *Ibid.* 3 Bro. C. C. 110.

(*z*) *Prowse and Abington*, 1 Atk. 485. *Carter v. Bletsoe*, 2 Vern. 617. S. C. Prec. Ch. 267, which weakens the previous case of *Jackson v. Ferrard*, 2 Vern. 424, as observed by Lord Hardwicke, 1 Atk. 486.

personal Estate (a), and though given *with Interest (b), [*26 yet if the Legatee dies before it is payable, the rule is the same, and the Legacy sinks into the Land; and that as well for the benefit of an *hæres factus*, as of an *hæres natus*; for Equity will not countenance the loading of an Heir for the benefit of an Administrator (c); or rather, perhaps, because the Court will govern themselves as far as is consistent with Equity, by the rules of the Common Law (d), which, in this respect, agree with the Civil Law (e). But if a Legacy be charged on both the personal and real Estate, and the personal Assets are sufficient, the Legacy is payable out of the same (f); or if only partly sufficient, then, it seems, so much thereof as the personal Estate will extend to pay will be considered as vested, and go to the Executors or Administrators of the Legatee (g).

An exception to the rule is, where the payment is postponed for the *convenience of the Estate*,—the circumstances, not of the person, but the Fund (h). The intent, too, where it appears, will control the general rule (i); “and,” says Lord Hardwicke (not very satisfactorily), “cases of this sort must be left to *the discretion of the Court, who are governed by prudential reasons and particular circumstances” (k). If portions out of Land are given to be paid at *eighteen or marriage*, and the Party dies before that time, the occasion of raising them, viz. the Advancement, ceases, and therefore the reason of giving it qualifies the Grant; as an annuity *pro consilio impenso and impendendo*, the Counsel is a foundation of the Grant; and so in these cases the provision for Advancement being the reason of the Portion, when that fails the Portion ceases likewise. It may be compared to what is called in Scotland *causa data et non secuta*, where the cause ceases; it is never to be raised for one purpose when designed for another (l).

Where Portions have been given out of Land, and *no time of payment expressed*, some Cases say they are Interests vested presently and transmissible (m); and others, that such Portions

(a) See Duke of Chandos v. Talbot, 2 P. Wms. 612.

(b) Gawler v. Standewick, 1 Bro. C. C. 106, in note.

(c) Jennings v. Looks, 2 P. Wms. 277.

(d) Prowse v. Abington, 1 Atk. 486.

(e) See Weedon v. Fell, 2 Atk. 12.

(f) Richardson v. Greese, 3 Atk. 69.

(g) Ibid. and Duke Chandos v. Talbot, 2 P. Wms. 613. Jennings v. Looks, 2 P. Wms. 278. Shearman v. Collins, 3 Atk. 320; but see Van v. Clarke, 1 Atk. 512, where Legacy given out of a mixed Fund was not raised.

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(h) Lowther and Condon, 2 Atk. 123. S. C. Barn. 327. King and Withers, Prec. Ch. 348.

(i) Sherman v. Collins, 3 Atk. 321. See Lowther v. Condon, 2 Atk. 133, confirmed 3 Atk. 322. Hodgson v. Rawson, 1 Ves. 47. Wilson v. Spencer, mentioned in 1 Ves. 48. King v. Withers, For. 117. Smith against Partridge, Amb. 266.

(k) Lowther v. Condon, 2 Atk. 132. (l) For. 122; and see Wilson v. Spencer, 3 P. Wms. 174.

(m) Evelyn v. Evelyn, 2 P. Wms. 666. Earl Rivers v. Earl of Derby, 2 Vern. 72, 92, 208. Cowper v. Scott, 3 P. Wms. 120, 1.

do not vest if the Children die before they want them (*) ; but *Lord Camden* seems to have been of opinion, that in all cases where Portions are postponed without being made payable at twenty-one or marriage, the postponing is for the convenience of the Estate (o), and the Legacy is vested ; more especially if a right of *Entry* be given (p).

28*] If there be a Bequest in favour of a particular Legatee,* and he dies, no benefit that Legatee could have claimed, if he had survived, can be set up against the persons to whom the Estate would come, subject to the disposition in favour of that Legatee if he had lived. If, for instance, a real Estate be given to A. and a personal Estate to B., exempt from Debts, that exemption is to be considered as intended only for the benefit of B., that he shall not pay those Debts, to which he would be liable if no such provision had been made ; and it is not a general exemption of the personal Estate (q).

Conditional Legacies are next to be considered.

Legacies of *personal Property*, given on conditions in *restraint of Marriage*, have been the subject of much grave discussion, and it would be difficult to reconcile all the Cases. Devises of *Lands*, upon a condition not to marry without consent, are effectual (r) ; but Legacies of *personal Estate* on such conditions are decided upon different grounds, and, whether *precedent* or *subsequent*, have always the most favourable construction put upon them to prevent a Forfeiture, and save a Child from being stripped of a Provision, especially where there have been no aggravating circumstances, and the end of the Father's intention 29*] and caution has been attained (s). In cases *of this sort the Court has made such a construction of words as they would not do in other cases (t).

It has been supposed to be an established rule in the *Civil Law* (u), and certainly has long been the doctrine of Courts of Equity, that where a *personal Legacy* is given to a Child on condition of *marrying with consent*, this (unless in those cases where on breach of the condition a smaller sum is given in the alternative) (x), is not looked on as a condition annexed to the Legacy,

(n) As in *Brues v. Brues*, 2 Vern. 439. S. C. Prec. Ch. 195.

(o) *Manning* against *Herbert*, Amb. 576.

(p) *Eames v. Hancock*, 2 Atk. 507. *Manning* against *Herbert*, Amb. 576.

(q) *Waring v. Ward*, 5 Ves. 675.

(r) *Fry and Porter*, 1 Mod. 309. S. C. 2 Ch. Rep. 26, and 1 Ch. Ca. 138.

(s) *Daley v. Desbouverie*, 2 Atk. 266. With respect to one point determined in this Case, it has been considered as "an excessively strong

decision," and observed upon as such in *Clarke v. Parker*, 19 Ves. 12, but the doctrine for which I have quoted it has not been quarrelled with.

(t) *Burton* against *Humphreys*, Amb. 256.

(u) See *Lex Papia Poppæa*. In *Mr. Hargrave's* able argument in *Scott v. Vernon*, 2 Vol. *Jurisconsult. Exercitationes*, p. 191, &c. he controverts the propriety of attributing the rule to the civil Law.

(x) *Gillet v. Wray*, 1 P. Wms. 284. *Creagh v. Wilson*, 2 Vern. 572.

but as a declaration of the Testator *in terrorem* (y); though it can hardly be seriously supposed a Testator would hold out the terror of that he never meant to happen (z). This Rule, however, is so strictly adhered to in the Ecclesiastical Court, that the marrying without consent is not considered there as a breach of the condition, *although the Legacy is actually given over*. But that doctrine has not been adopted in Courts of Equity, for there it is considered as a breach of the condition, and that the Legacy is forfeited (a), and upon this ground that, *the [*30 Common Law allows of reasonable restraint upon Marriage, and, therefore, where by the Common Law there is a clear and distinct vested right to the Legacy in a third Person, Equity will not interpose at the Suit of the Legatory to take it from him (b).

But though where a Legacy, given on condition of Marriage with consent, is charged on the real Assets, the condition is not considered as merely *in terrorem* (c); yet it is so considered where the Legacy is not originally a charge upon the Land, but the Lands are charged only as *auxiliary*, upon a deficiency of the personal Estate (d), in which case if necessary, the Assets will be marshalled in favour of the Legatee (e).

If the Bequest over of Personality is merely a *residuary* Bequest, it has been much questioned whether a Marriage without consent is a forfeiture of the Legacy. In the unprinted case of *Hayward v. Paget* (f), alluded to in *Harvey v. Aston* (g), and in *Scott v. Tyler*, (h), by the name of *Paget v. Haywood*, Sir Joseph Jekyll expresses himself as follows: "It is a rule in this Court (i), that where a Legacy is given (k) on condition of Marriage with *consent, and if a Marriage is had without con- [*31 sent then to go over to the residuary Legatee, it is the same as if

(y) *Rightson v. Overton*, 2 Freem. 21. *Jervoise v. Duke*, 1 Vern. 20. *Garrett v. Pritty*, 2 Vern. 293. *Reynish v. Martin*, 3 Atk. 331. S. C. 1 Serj. Wils. 130. *Jones and Suffolk*, 1 Bro. C. C. 528. *Cockel v. Phipps*, 1 Dick. 391.

(z) 2 Bro. C. C. 488; and see *Clarks v. Parker*, 19 Ves. 14.

(a) *Bellasis v. Erwin*, 2 Freem. 171. S. C. 1 Chan. Cases, 22. *Rightson v. Overton*, *ibid.* 21. *Stratton v. Grymes*, 2 Vern. 357. *Chaver v. Sparling*, 1 Chan. Cas. 122. 1 Ventr. 360. *Proc. Chan.* 562. 2 P. Wms. 588. *Grayden v. Hickes*, 2 Atk. 18. S. C. *Groumels and Radiments, &c.* 199. *Wheeler and Bingham*, 3 Atk. 367. S. C. 1 Serj. Wils. 136. *Underwood v. Morris*, 2 Atk. 184, *contra*; but that case was overruled in *Hemming v. Hunkley*, 1 Bro. C. C. 303. S. C. 1 Cox, 38; and in *Scott*

and *Tyler*, 2 Bro. C. C. 488. S. C. Judgment from Lord Thurlow's own notes, 2 Dick. 721. *Stackpoole and Beaumont*, 3 Ves. 89. *Mercer and Hall*, 4 Bro. P. C. 328. *Keiley against Monk*, 3 Ridgw. P. C. 246.

(b) *Keily against Monk*, 3 Ridgw. P. C. 247.

(c) This was solemnly determined in *Harvey v. Aston*, 1 Atk. 379; and see *Rennish v. Martin*, 3 Atk. 332. and *Keily v. Monk*, 3 Ridgw. P. C. p. 206, and more particularly p. 251.

(d) 3 Atk. 333.

(e) *Ibid.* 336.

(f) The author is in possession of a MS. note of this case.

(g) 1 Atk. 379.

(h) 2 Bro. C. C. 488.

(i) 2 Vern. 293. *Garret v. Pritty*.

(k) And see S. C. 2 Freem. 220; and see *Semphill and Payley*, *Proc. Ch.* 562.

there had been no limitation over at all ; and I am of opinion this case comes within that rule ; for here the Devise over is to the Executrix, and to be at her disposal, though not for her benefit." At the end of this Case it is observed by the Reporter, that "*it seemed to be against the opinion of the Bar.*" In another Case, however, it was held that a Bequest of a Residuum is no Bequest over, so as to take away the benefit of a Legacy given on condition not to marry without consent, but falls within the Cases that construe such condition only *in terrorem* (l).

Lord Hardwicke also held that a Devise over to be effectual must be a *special* Bequest on the event of not observing the condition ; and that a residuary Devise, unless penned in such a manner as is tantamount to a special Devise over, as by specially directing the Legacy to sink into the Residue, will not avail (m) ; and Lord Thurlow seems to have been of that opinion in *Scott and Tyler* (n). So a direction that a Legacy, upon breach of the condition, should sink into the fund created for payment of Debts and Legacies, in which there was no deficiency, is not 32*] such a residuary Bequest as would take the conditional* Legacy out of the doctrine as to Legacies *in terrorem* ; for the creditors and Legatees who are alone interested in that fund cannot claim a vested right, or any interest whatever in the Legacy ; and a vested right in a third person to the Legacy is the ground upon which alone Courts of Equity refuse to interpose where there is a Devise over (o). On the other hand, however, several authorities may be adduced to show that a mere *residuary* Bequest is in such cases effectual (p). The point, it seems, is unsettled.

In regard to personal Property, conditions in restraint of Marriage generally are, it seems, void ; and a condition *absolutely enjoining celibacy*, or tantamount to a prohibition of Marriage, would be a void condition (q) ; but on Gifts or Devises of the *Inheritance*, or *Freehold of Lands*, almost any condition or limitation, however restricting the right of Marriage, unless it

(l) *Dalrumple v. Coningham*, 11 July 1745, at the Rolls, MS. ; and see *Precedent* 562.

(m) *Wheeler v. Bingham*, 3 Atk. 367. S. C. 1 Wils. 135. "Mr. Wilson's report of this case," says *Ld. Clare*, "which is infinitely the best, is silent as to any such observation by Lord Hardwicke, and it seems to me to be an observation not altogether consistent with the whole train of his reasoning, as reported by Mr. Wilson." Per Lord Clare in *Keily v. Monk*, 3 Ridgw. P. C. 253.

(n) 2 Bro. C. C. 488. S. C. 2 Dick. 712, where the Judgment is given from Lord Thurlow's MS.

(o) See *Keily v. Monk*, 3 Ridgw. P. C. 253.

(p) Lady Kilmurry's case, mentioned in *Parker v. Parker*, 2 Freem. 59. *Amas v. Horner*, Eq. Cas. Abr. 112 ; and what is said in *Harvey v. Aston*, 1 Atk. 379 ; and see Mr. Hargrave's *Vindication of these authorities*, 2 vol. *Jurisconsult. Exercitationes*, 241. &c. In *Harvey v. Aston*, Forr. 216, Sir J. Jekyll says there never was a Decree in *Amas v. Horner*. See what is said in *Keily v. Monk*, 3 Ridgw. P. C. 252, 4.

(q) 2 Vol. Hargr. *Jurisconsult. Exercitationes*, 255.

amounts to a prohibition of ever marrying, that is, to an absolute injunction of celibacy, has been considered as effectual (r).

*An injunction to ask consent is lawful, as not restraining [*33 Marriage generally. A condition that a Widow shall not marry is not unlawful (t);—an Annuity during widowhood;—a condition to marry, or not to marry, *Titius*, is good—a condition prescribing due ceremonies, and place of Marriage, is good; still more is a condition good which only limits the time to *twenty-one* (u), or any other reasonable age, provided it be not used evasively as a cover, intending to restrain Marriage generally (x); and a Bill of Discovery, whether a defendant, entitled during widowhood (y), or liable to forfeiture of a Legacy in case of Marriage without consent (z), is married, is sustainable, and cannot be demurred to. So where a Devise over of an Estate in case of Marriage was considered as a conditional Limitation, and not as a forfeiture, a Demurrer to a Bill for a Discovery of Marriage, was overruled (a).

It is observable, in regard to Conditions annexed to a Devise of real or personal Estate, and no notice required to be given, nor any person obliged to give notice, the Legatees must perform the Condition, whether they have notice or not, (unless in the case of an Heir at Law in Possession (b), or they will not be entitled; and if they do not, where there is *a Devise over, [*34 a Forfeiture incurs though they have no notice (c).

If one by Will gives Legacies, to be paid at *Twenty-one or Marriage*, which shall first happen, provided they marry with the consent of their Father or Mother, or the survivor of them, otherwise to sink into the personal Estate, the Legacies vest at *Twenty-one*, and either of them marrying without consent afterwards, is of no consequence (d).

A Condition by Will, requiring the consent of Trustees to a Marriage, has been determined not to be applicable to the *second Marriage* of a Daughter, who had married between the date of

(r) *Ibid.* 256. Co. Lit. 52; and see *Williams v. Porter*, 186, 300. S. C. 1 Chan. Cas. 142. 2 Lev. 21. *Booth v. Booth*, 2 Chan. Cas. 109. *Harvey v. Aston*, 1 Atk. 361. S. C. For. 212. Comy. 726. Willes 83. *Reymish v. Martin*, 3 Atk. 330. *Scott v. Tyler*, 2 Bro. C. C. 431. S. C. 2 Dick. 712. *Stackpole v. Beaumont*, 3 Ves. 89.

(t) *Barton v. Barton*, 2 Vern. 308. *Scott and Tyler*, 2 Bro. C. C. 488.

(u) As to this, see *Stackpole v. Beaumont*, 3 Ves. 97.

(x) *Scott against Tyler*, 2 Bro. C. C. 488. S. C. better reported from Lord Thurlow's written argument, 2 Dick. 721. See the observation on

the Judgment in this case, 3 Ves. 97. Swinb. part 4, sect. 12.

(y) 2 Ch. Rep. 68.

(z) 2 Atk. 392, 2 Ves. 265.

(a) 2 Atk. 393.

(b) *Burleton against Humphrey*, Amb. 256; and see what is said of that case in *Clarke v. Parker*, 19 Ves. 20.

(c) *Chauncey v. Graydon*, 2 Atk. 616.

(d) *Deabody v. Boyville*, 2 P. Wms. 547. *Pullen v. Ready*, 2 Atk. 587; and see *Knight v. Cameron*, 14 Ves. 380, and *Osborne v. Brown*, 5 Ves. 527, a case decided, it seems, on the same principle.

the Will, and the death of the Testator, and was a Widow at his death (e).

Where the condition becomes *impossible*, as where the consent must be of *two*, and one dies, a Marriage without consent is good; for it is a naked power, not coupled with an Interest, and does not survive (f).

According to a dictum of *Ch. Bar, Comyns*, as reported in *Atkyns* (g), he is made to say that, where the *major part* of the Trustees consent, that is sufficient, though the consent of *all* to the Marriage is required by the Will; but that has been expressly ^{35*} denied (h), the consent of all being necessary to avoid the Forfeiture (i).

If, however, one of three Trustees *fraudulently* withholds his assent to the Marriage, a Marriage, it seems, with the consent of one of the other two, is sufficient (k).

It was the doctrine of *Lord Mansfield* (l), that if the Person whose consent is required, is a Devisee over, he must show the reason of his dissent; but *Lord Eldon* was of a different opinion, and that he is not required to show that he has unreasonably refused his assent (m).

Where the condition of Marriage with consent is a condition *subsequent*, the Legatee will keep her Legacy, though she marries without the required consent (n).

If a Settlement before Marriage be one of the terms on which a Legacy is given, and there is a tender of such a settlement, but, by the neglect of the Trustee, it is not executed before Marriage, it may be made after, and the Legacy will not go over (o).

^{36*} Where a Marriage was directed to be with the *consent of the Father, under a penalty or forfeiture of the Fortune, and the Father treated for the Marriage, and a Jointure was agreed upon, and directions were given to draw the Writings, but before they were completed the parties married without the consent of the Father, it was held to be no Forfeiture, as there was an as-

(e) *Crommelin v. Crommelin*, 3 Ves. 227; and see *Hutchinson* against *Hammond*, 3 Bro. C. C. 146. *Parnell v. Lyon*, 1 Ves. & Bea. 484.

(f) *Peyton* against *Berry*, 2 P. Wms. 626, confirmed on appeal to the Chancellor, MS. Reports. In *Jones and Suffolk*, 1 Bro. C. C. 529, it is said of this Case, that "it goes a great way." And see *Show*. P. C. 87. Co. Lit. 206; but see *Graydon v. Hickes*, 2 Atk. 18.

(g) *Harvey v. Aston* 1 Atk. 375.

(h) *Clarke v. Parker*, 19 Ves. 15, 24.

(i) The passage in *Atkyns* has been considered as a misreport, no such language appearing in the Chief

Baron's note of his Judgment in that case, [Com. 726,] or in a MS. Report of the same case which Lord Eldon had seen.

(k) *Mesgrett v. Mesgrett*, 2 Vern. 580. *Lord Strange v. Smith*, Amb. 263; and see what is said in *Clarke v. Parker*, 19 Ves. 18.

(l) *Long v. Dennis*, 4 Burr. 2052.

(m) *Clarke v. Parker*, 19 Ves. 22.

(n) See *Reynish v. Martin*, 3 Atk. 322; and see *Burleton v. Humphrey*, Amb. 256. *Garret v. Pritty*, 2 Vern. 293. *Marples v. Bainbridge*, 1 Madd. Rep. 590.

(o) *O'Calaghan v. Cooper*, 5 Ves. 117.

sent before and after the consummation, and no disagreement, or alteration of the Father's good liking in the mean time (p).

Where a Legacy is given, the greater part of which is to go over, upon Marriage without the consent of the Executors, a conditional consent, upon the offer of a Settlement, may be retracted on a subsequent refusal to settle; and a Marriage without such consent is a Forfeiture (q). A consent, however, cannot be withdrawn, by adding terms that do not go to the propriety of giving the consent (r); but it is going too far to say it cannot be withdrawn for any reason, good or bad (s). Such consent might be withdrawn under circumstances of a positive duty in the Trustees to countermand it (t).

The conduct of Parties may amount to a consent, though no express consent be given (u), a constructive consent being sufficient (x), unless, perhaps, where the *consent is required [*37 to be in Writing (y). Where a Devise was, that "if either of the Devisees should marry into the Families of R. and G. and have a Son, I give all my Estate to him for Life, with Remainders over; if not, to *Randall*;" and the Devisees married, but not into the Families of R. or G., and *Randall* filed a Bill, claiming the Estate, it was dismissed, the Devisees having their whole Lives to perform the condition (z). And where the consent of an Executor (a) or of Parents is required, a *general consent* to any Marriage the Child may contract is sufficient (b).

A consent after the Marriage has been held sufficient, where it was not required to be in Writing (c).

A Power of trying how far the grounds are reasonable, upon which Persons intrusted by Parents have given or withheld their consent, has been exercised by the Court, but it has been considered a very dangerous power (d). Many reasons might operate against individual consent into which the Court could not providently inquire, and which it would be quite competent to the party to refuse to disclose (e).

Where a Legacy was given upon condition of releasing all claims upon the Testator's Estate and Effects within a limited time, and the Legatee took the Legacy, but did not actually re-

(p) 1 Ch. Rep. 1; and see 1 Mod. 310.

(q) *Dashwood v. Lord Bulkeley*, 10 Ves. 230.

(r) *Ibid.* 242; and see *Lord Strange against Smith*, Amb. 263.

(s) *Clarke v. Parker* 19 Ves. 13.

(t) *Dashwood v. Lord Bulkeley*, 10 Ves. 230; and what is said in *Clarke v. Parker*, 19 Ves. 13; contra *Merry v. Ryves*, 1 Eden's Rep. 1.

(u) *D. Aguilar v. Drinkwater*, 2 Ves. & Bea. 225.

(x) *Campbell v. Lord Netterville*, 2 Ves. 534, and noticed 2 Ves. & Bea.

238. *Merry v. Ryves*, 1 Eden, 5.

(y) See *Clarke v. Parker*, 19 Ves. 12, and the case of *Mesgrett v. Mesgrett*, 2 Vern. 580, there mentioned; see also 19 Ves. 24.

(z) *Randall v. Payne*, 1 Ves. jun. 55.

(a) *Pollock v. Croft*, 1 Mer. 181.

(b) *Mercer against Hall*, 4 Bro. C. C. 326.

(c) *Sic dict.* *Ibid.* 328.

(d) *Dashwood v. Lord Bulkeley*, 10 Ves. 245; and see what is said in

Clarke v. Parker, 19 Ves. 11.

(e) *Clarke v. Parker*, 19 Ves. 11.

38*] lease, it was held *he was bound by his Election, and that his Executors should release. These are considered, not as Gifts upon a condition precedent, which requires strict performance, but are conditions annexed to the body of the Gift, and pass with it (f). And where Legacies were given to four Grandchildren, upon condition that as they came of age they should release all claims to the Testator's Estate; the condition, it was held, must be taken *distributively*, and such only as refused to release forfeited their Legacies (g).

A provision in a Will, that any Legatee controverting the disposition the Testator had thereby made of his Estate should forfeit his Legacy, is held to be *in terrorem* only, and no Forfeiture is incurred by contesting any disputable matter in a Court of Justice (h), unless there be a Devise over, on breach of the condition (i).

A condition inconsistent with the terms of the Gift of a Legacy is void. As, where there was a Bequest to A. for Life, and at his decease to his Heirs, Executors, &c. "but if he attempts to dispose of the Principal, the Legacy is to go to another," the condition was held to be inconsistent, and that A. took the absolute interest (k).

If there is a declaration and undertaking by a Legatee to do an act, in consideration of a Testator's devising to that Legatee, the Court will decree it, whether such undertaking was before the Will was made, or after (l).

Where, by a Will noticing the probability that the Legatee was not living, a Legacy was given upon condition that he should return to *England*, and personally claim of the Execu-

(f) *Earl of Northumberland, v. Earl of Aylesford*, Ambli. 540, and on rehearing, *ibid.* p. 657.

(g) *Hawes v. Warner*, 2 Vern. 478.

(h) *Powell v. Morgan*, 2 Vern. 91. *Morris v. Boroughs*, 1 Atk. 404.

(i) *Cleaver v. Spurling*, 2 P. Wms. 528. In the Will of the celebrated General Washington there was the following clause:—"Having endeavoured to be plain and explicit in all the Devises, even at the expense of prolixity, perhaps of tautology, I hope and trust that no disputes will arise concerning them; but if, contrary to expectation, the case should be otherwise, from the want of legal expression, or the usual technical terms, or because too much or too little has been said on any of the Devises, to be consonant with Law, my will and direction expressly is, that all disputes, (if unhappily any should arise) shall be decided by three impartial and intelligent men, known

from their probity and good understanding, to be chosen by the disputants, each having the choice of one, and the third by those two; which three men thus chosen shall, unfettered by law or legal constructions, declare the sense of the Testator's intentions; and such decision is to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States."—Such a clause as the above in Wills, if valid, might save much animosity and litigation; but, it seems, that the effect of the Will, notwithstanding such a clause, might be contested. See the observation in the Judgment in *Phillips v. Bury*, 1 vol. Burn's Ecc. Law. 409, 5th edit. and also *Gibbons v. Dawley*, 2 Ch. Cas. 198. By the American Law, probably, such a clause is effectual.

(k) *Bradley v. Pritto*, 3 Ves. 324; see Dig. 30. 1. 114. 14.

(l) *Drakeford v. Wilks*, 3 Atk. 540

trix, or in the Church Porch, and if he should not so claim within seven years, to be presumed dead, and the Legacy to fall into the Residue; the Legatee not having returned, and dying abroad within seven years, the Legacy was held not to be due: the existence of the Legatee, though appearing otherwise, being to be proved by the particular means prescribed; and therefore not within the Case of the Civil Law, where the end being obtained the means were not considered as essential (m).

*Where the Legacy was in Trust to pay the Interest to [40 the separate use of A. for Life, and after her decease, as to the Capital, for her Children, and if no Child, to pay the Interest to her husband during his Life, and from and after his decease, *in case he shall become entitled to such Interest*, then to pay the Principal to other Persons; it was held, that though the Husband died during his Wife's Life, and so never became entitled to the Interest, yet the Limitation over was effectual, and the words "*in case he shall become entitled to such Interests*," were considered not to amount to an *express precedent Condition* (n).

In another case, where there was a Bequest of a Residue in Trust in case A. should, within six Months after the Testator's decease, give Security not to marry B., then, and not otherwise, to pay the Children of A., with a proviso to go over if he should refuse or neglect to give any Security, it was held that she might retract a refusal; and that a Bond given within six Months, *exclusive* of the day of the Testator's death, was a good performance of the Condition (o).

A Testator gave 1,000*l.* to D., but if D. should not be alive, and there be certain intelligence thereof, the Testator willed that the same should be divided between A. and B. D. appeared to have been alive at the time of the Will, but died in the life-time of the Testator. A. and B. were held entitled to the 600*l.* (p).

*A Legacy with a Condition annexed, *contra bonos mores*, given, for instance, to a Feme Covert, on condition of living apart from her Husband, is a bad Condition, and the Legatee takes unfettered with the Condition (q). (1)

(m) Tulk v. Houlditch, 1 Ves. & Bea. 248; and see Burgess v. Robinson, 1 Madd. Rep. 172.

(n) Pearsal v. Simpson, 15 Ves 29.

(o) Lester, v. Garland, 15 Ves. 248.
(p) Parry v. Boodle, 1 Cox, 184, and the cases there cited.

(q) Brown v. Peck, 1 Eden, 140.

(1) A testator, by his will, gave to his daughter, "during her separation from her husband, one thousand dollars a year;" the daughter lived separate from her husband, when the will was executed, but they afterwards lived together, and were so living at the time of the testator's death; and about three months afterwards, they again separated and lived apart for a year; it was held, that the condition annexed to the bequest, was lawful and proper; but as the separation had ceased when the will took effect, the legacy was at an end; and a voluntary separation of the husband and wife, after the death

Under this head of conditional Legacies may be ranked the implied condition which attaches where a Legacy is left to one who is appointed Executor; in which case it has been held that such Legatee is not entitled to his Legacy unless he proves the Will; but he may prove at any time; even after the hearing of the Cause (r). It might be different, perhaps, if the Legacy was by one Will, and the appointment of Executor by another (s).

A Legacy upon condition that the Legatee shall change the course of his life he has too long followed, and give up all low company, and frequenting public houses, and drinking to excess, was held to be a valid Condition, and capable of being enforced (t).

When a Legacy is a Satisfaction, and when a Legacy is considered as satisfied.

In general, when a Bequest operates as a satisfaction, it must be of an *equal sum—equally beneficial—and of the same nature* (u).

If a Legacy be *smaller* than a Debt owed to the Legatee, it is not, even *pro tanto*, a satisfaction of the Debt (x); nor is a 42* | Bequest of specific things considered *as a satisfaction (y), unless accepted as such; for if a Man gives a matter of curiosity or art, as a fine Picture, by way of satisfaction of a Debt, and the Legatee accept it, though the value be less than the Debt, there could be no ground for equity to interpose (z). But it is a rule, that a *pecuniary* Legacy is a satisfaction of a Debt, provided it is *equal* to (a), or *greater* than the Debt (b); but any *little* circumstance, (in which it differs from the doctrine as to the satisfaction of *Portions*) is laid hold of by the Court to take it out of the rule (c); it being considered as unsatisfactory (d) and even absurd (e).

(r) Reed v. Devaynes, 2 Cox, 235.

(s) Ibid.

(t) Tattersall v. Howell, 2 Meriv. 26.

(u) Hyde v. Hyde, 1 Cox. 48.

(x) Eastwood v. Vincke, 2 P. Wms. 616. Mos. 295.

(y) Stacey v. Styles, M. 1733. MS.

(z) Hyde v. Hyde, 1 Cox. 49.

(a) Browne v. Dawson, 2 Vern. 496. Sic dict. Mos. 8.

(b) Wallace v. Pomfret, 11 Ves. 544; and see Jeffs v. Wood, 2 P. Wms. 132. In Crompton v. Sale, 2 P. Wms. 555, it is said the Gift must also be declared to be in satisfaction. Sed. qd. Richardson v. Greene, 3 Atk. 67. Graham v. Graham, 1 Ves. 263.

(c) Hinchliffe v. Hinchliffe, 3 Ves. 529; but see Wallace v. Pomfret, 11 Ves. 547, where Lord Eldon says, "If this rule of Presumption was once established, and understood to be the rule, it would have been infinitely better that it should not be destroyed by small observations upon small circumstances; the Court trying to find out a distinction. It would have been better either to have abided by the rule, or to have said boldly, it should exist no longer."

(d) See what Lord King says in Chancey's case, 1 P. Wms. 470.

(e) Matthews v. Matthews, 2 Ves. 636. 1 Dick. 331. Barchey v. Waine.

Wherever there are circumstances, or a presumption that the Testator's intention was not that the Legacy should be an Ademption of a Debt, as where it is given for a particular purpose, *diverso intuitu* (f), or where there is an express Devise for the payment of Debts and Legacies (g), the Court have leant against holding* it to be a satisfaction (h). But [*43 *Lord Talbot* would not allow of parol Evidence to show that the Testator designed to give the Legacy exclusive of the Debt (i).

The presumption (arising from the Legacy) that the Debt is satisfied, may, however, be rebutted on the face of the Will; as where the Testator creates a Fund for the payment of his Debts, and, subject to the same, charges his Legacies thereon (k).

If the Debt due to the Legatee be upon an *open or running account*, so that it might not be known to the Testator whether he owed any Money to the Legatee, the Legacy will not be considered as a satisfaction of the Debt. Nor is a Legacy a satisfaction of a Debt contracted after the making of the Will; for in such case the Legacy could not be intended as a satisfaction (l).

A Legacy is not an extinguishment of a negotiable Security (m). And though a Legacy to an Executor excludes him from the undisposed surplus of the Testator's Estate (a doctrine which will hereafter be more fully considered), it will not be allowed to operate for two purposes, and so as also to be a satisfaction for a Debt due from the Testator (n).

And though a Gift of a Legacy may, as in the *Civil Law*, (o), be so framed as to release a demand, *yet where it was [*44 a Bond Debt, and was uncanceled in the Testator's possession, it was held not to be released, no intention appearing to release (p).

A Legacy given by the Will of a Parent (r), or by a Husband to his Wife (s), is not considered upon any different footing from

wright, 3 Ves. 466; and see Eastwood v. Vinks, 2 P. Wms. 616, and Richardson v. Greese, 3 Atk. 66. Fowler v. Fowler, 3 P. Wms. 364; and Barrell v. Beckford, 1 Ves. 521.

(f) Matthews v. Matthews, 2 Ves. 635.

(g) Richardson v. Greese, 3 Atk. 65. Hinchliffe v. Hinchliffe, 3 Ves. 529, 466.

(h) Nicholls v. Judson, 2 Atk. 301.

(i) Fowler v. Fowler, 3 P. Wms. 354.

(k) Chancey's case, 1 P. Wms. 408. Richardson v. Greese, 3 Atk. 65. Hinchliffe v. Hinchliffe, 3 Ves. 529, cited 2 Fonbl. Tr. Eq. 323, n. 1.

(l) Rawlins v. Powel, 1 P. Wms. 299. Thomas v. Bennett, 2 P. Wms. 342. Cranmer's case, Salk. 508. Mascall v. Mascall, 1 Ves. 324. Cole v. Ashborne, 1 March 1744, MS.

(m) Carr v. Eastbrooke, 3 Ves. 564.

(n) Matthews v. Matthews, 2 Ves. 637.

(o) Inst. 2, 20, 13.

(p) Wilnot v. Woodhouse, 4 Bro. C. C. 227.

(r) Tolson v. Collins, 4 Ves. 490, 492. Chave v. Farrant, 8 Ves. 8.

(s) Fowler v. Fowler, 3 P. Wms. 353.

that of a Legacy by any other Person, as to *the satisfaction of a Debt.* (1)

A Legacy, in order to satisfy a Debt, must be payable *immediately* on the Testator's death (t). If, therefore, the Debt be payable *one month* after the Testator's death, and the Legacy *six months* after, it is not a satisfaction (u). So to be a satisfaction there must be a *certainty* of payment; therefore a Legacy on a *contingency* will not be a satisfaction (x).

If a Legacy be not as certain as to the duration and commencement as the thing to be satisfied, it will not be a satisfaction; and therefore, where a Lady, indebted to a Servant for wages, gave by Will ten times as much as she owed, or was likely to owe, yet because made payable one month after her death, so that the Servant might not outlive the month, a thing unlikely, the Court held it not to be a satisfaction (y). In some cases Legacies to Servants are held never to be considered as a satisfaction (z). So, where a *Parent, indebted to his Children, gives them twenty times as much in the whole amongst them, but not payable if they do not arrive at twenty-five years of age, or do not marry, this is not a satisfaction (a).

In one Case, Mr. Justice Buller seems to have considered a Gift of a *Residue* as a satisfaction for money secured to be paid by Marriage Articles (b); but in a subsequent Case, it was said, as a general rule, that a *Residue* shall not be taken in satisfaction of a Covenant in Marriage Articles, as the Legatee would have to wait the result, perhaps, of a long protracted Suit in Chancery, before it could be ascertained what the Residue was (c). So a Residue is not a satisfaction for a sum to be laid out in Land in Fee (d), nor is it a satisfaction for a Debt (e).

A Portion to a Child by the Will of a Parent, if there is any prior provision, and such Portion is *equal* to what is secured, is, by implication (f), a *satisfaction*, and if not equal, it is a satis-

(t) Clarke v. Sewell, 3 Atk. 98; and see Teacock v. Falkener, 1 Bro. C. C. 296.

(u) Haynes against Mico, 1 Bro. C. C. 129; and see on this head Compton v. Sale, 2 P. Wms. 552.

(z) Nicholls v. Judson, 2 Atk. 301; and see Pullen v. Cresy, 3 Anstr. 830.

(y) Matthews v. Matthews, 2 Ves. 636.

(x) Richardson v. Greese, 3 Atk. 69; and see Wallace v. Pomfret, al-

luded to in note to 1 Vern. 346.

(a) Matthews v. Matthews, 2 Ves. 636.

(b) Pearson against Morgan, 2 Bro. C. C. 388. Sed. vid. Devese v. Pontet, 1 Cox, 188.

(c) See Devese v. Pontet, 1 Cox, 188.

(d) 2 Ves. 37, Alleyne v. Alleyne.

(e) Devese and Pontet, mentioned in Prec. Ch. note, 240, by last editor, S. C. 1 Cox, 288.

(f) Webb v. Webb, 2 Vern. 110.

(1) A bequest by a father to the children of a deceased son, is not a satisfaction of a debt due from the father to the son's estate. *Ladson v. Ward*, 1 Des. 314.

faction *pro tanto* (g), unless it is shown clearly on the face of the Will that it is not so intended (h), or by evidence to meet the *presumption, and then, and, as it seems, then only (i), evidence is admissible to fortify the presumption (k).

It has been said, the Court *leans* against double Portions (l), but Lord Thurlow disliked that expression (m).

A Gift by Will, in order to be taken as a satisfaction of a Portion, must be of the *same nature*, and attended with the *same certainty*, as the thing in lieu of which it is given (n). Land, therefore, is not to be taken in satisfaction for Money; nor Money for Land (o); but in the case of double Provisions by a Father for a Child, slight circumstances of difference are not regarded (p); at least, where the question is, not whether a bounty is meant to satisfy a Debt, but whether one bounty is to be substituted in the place of another (q).

In the case of Portions, therefore, as both move from the same Person, the Court will overlook the difference at the time of payment, and consider the Legacy as a satisfaction for the Portion; and whether the sum be greater or less is immaterial; but in the latter case, it seems, it will only be a satisfaction *pro tanto* (r).

*The question of satisfaction is, generally, a question of [*47 intention (s); but not always, as before observed (t).

In most of the cases relative to the satisfaction of Portions or Legacies, by a Gift, the Testator does not appear to have referred to the pecuniary value of the thing he was giving; and the question has generally been, whether, as upon entering into a computation of the value of the thing given, it turned out equal to the Portion, or the Legacy, it should be taken as a sat-

(g) Chaplin v. Chaplin, 3 P. Wms. 47; but see Mr. Fonbl. observations in 2 Vol. Treat. Eq. 324, in n.

(h) See Copley v. Copley, 1 P. Wms. 146. Jesson v. Jesson, 2 Vern. 255. Lord Thurlow doubted as to this Rule in Warren and Warren, 1 Bro. C. C. 308, but it is now well established. See Chaplin v. Chaplin, 3 P. Wms. 245. Hinchliffe v. Hinchliffe, 3 Ves. 527, 529. The subject was much considered in Hanbury v. Hanbury, 2 Bro. C. C. 352, 529; and see Tolson v. Collins, 4 Ves. 491. Sparkes v. Cator, ibid. 530, and Hyde v. Hyde, 1 Cox, 44.

(i) Hartopp v. Hartopp, 17 Ves. 192.

(k) Druce v. Denison, 6 Ves. 398. See Freemantle v. Banks, 5 Ves. 85, where the Court appears to have refused such evidence.

(l) 1 Atk. 427, and 3 Atk. 98.

(m) 1 Bro. C. C. 309; and see 1

Ball and Bea. 276.

(n) Barrett v. Beckford, 1 Ves. 521.

(o) Bellasis v. Uthwaite, 1 Atk. 426. Broughton v. Errington, 7 Bro. P. C. 461. Toml. Edit. Eastwood v. Vincke, 2 P. Wms. 613; and see Probert v. Morgan, 1 Atk. 441. Bengough v. Walker, 15 Ves. 512.

(p) 3 Ves. 535, ibid. 456.

(q) Hartopp v. Hartopp, 17 Ves. 191; and see Hinchliffe v. Hinchliffe, 3 Ves. 529, and Twisden v. Twisden, 9 Ves. 427.

(r) 1 Bro. C. C. 310. Sed. vid. Chaplain v. Chaplain, 3 P. Wms. 216.

(s) Atkinson v. Webb, 2 Vern. 478. Pearson against Morgan, 2 Bro. C. C. 388, 2 Atk. 58. Eastwood v. Vincke, 2 P. Wms. 616. Slaney v. Styles, MS.

(t) Ante, 1 vol. 391.

isfaction ; the Testator not having indicated any idea of his own, whether it was or was not correspondent in value to the Debt which he owed, or the Legacy he gave (u).

Where, by Settlement, a sum was provided for Daughters' Portions on failure of Issue male, and the brother of the Daughters, who might have barred them by a recovery, gave them, by Will, above the value of the sum secured by the Settlement, it was held to be a satisfaction (x).

Where under a Trust Term by the Will of the Grandfather for raising Portions, it was provided, among other events, that if the Children should be by their Father in his life-time advanced and preferred with Portions as good, or greater, the Term was to cease, it was held that personal Property taken under the Intestacy of the Father was not a satisfaction (y).

48*] If a Father by Will gives a Legacy to his Son, and afterwards takes his son into Partnership, and gives him half the Stock in Trade, this is not a satisfaction of the Legacy, it not being *ejusdem generis* (z).

Having considered the doctrine as to the satisfaction of Legacies, we may proceed to state the cases in which a Devisee is put to an Election.

When a Devisee is put to an Election.

A LEADING, if not the earliest Decision as to Election, is *Noyes v. Mordaunt* (a), a Case of real Estate, which was followed by *Vincent v. Vincent*, a Case of personal Estate (b) ; by *Frank v. Standish* (c), the Case of a Copyhold Estate ; and by many other cases (d), the result of which appears to be, that a Person shall not claim an Interest under an Instrument whether a Deed (e), or a Will, without giving full effect to that Instrument as far as he can. This rule has been said to be universal, and without exception (f). It applies to interests of married Women (g) ; interests immediate, remote (h), or contingent ; of value, or not of value (i).

(u) Vid. *Bengough v. Walker*, 15 Ves. 512.

(x) *Smith v. Duffield*, 2 Vern. 177.

(y) *Twisden v. Twisden*, 9 Ves. 413. S. C. MS.

(z) *Holmes v. Holmes*, 1 Cox, 39.

(a) 2 Vern. 581. *Clarke v. Guise*, 2 Ves. 617. *Morris v. Burroughs*, 2 Atk. 629.

(b) See 1 Ves. 260.

(c) 1 Bro. C. C. 588, in note. *Highway v. Banner*, ib. 584.

(d) *Streatfield v. Streatfield*, For. 176. *Blake v. Bunbury*, 1 Ves. jun. 523. *Lewis against King*, 2 Bro. C. C. 601. *Whistler v. Webster*, 2 Ves. jun. 367. *Villareal v. Lord Galway*, 1 Bro. C. C. 292, in note. *Shedden*

v. Goodrick, 8 Ves. 496. *Rich v. Cockell*, 9 Ves. 379. 2 Sch. & Lefr. 267.

(e) That the doctrine of Election extends to Deeds as well as Wills, see *Bigland v. Huddleston*, 3 Bro. C. C. 225. *Chetwynd v. Fleetwood*, 4 Bro. P. C. 435. *Moore v. Butler*, 2 Sch. & Lefr. 266. *Birmingham v. Kirwan*, 2 Sch. & Lefr. 450. *Green v. Green*, 2 Meriv. 86.

(f) 1 Bro. C. C. 293 in note.

(g) *Villa Real v. Lord Galway*, 3 Ves. 385.

(h) *Earl of Shaftesbury v. Arrow-smith*, 7 Ves. 480.

(i) *Wilson v. Lord John Townshend*, 2 Ves. Jun. 697.

*If the Testator gives what is not his Property, but [*49 which he supposes to be his, and gives to the person whose Property it is, an Interest by his will, that Person will not be permitted to defeat the disposition where it is in his power, and yet take under the will (l); and the same Rule applies though the Testator knew he had no right to dispose of the Lands, and yet knowing it, takes upon himself to dispose of them (m). A condition is in these cases implied, either that the Devisee shall part with his own Estate or shall not take the bounty (n); or rather, perhaps, that the disappointed Devisee shall take out of the Estate over which the Testator had a power, a benefit correspondent to that of which he is deprived by non-compliance with the Will (o) (1). It is a case of *Compensation*, and not of *Forfeiture*, which applies only on the non-performance of an *express Condition* (p); and, it seems, the Compensation must be, by the disappointed Devisee having so much of *the Es- [*50 tate itself over which the Testator had a power as will compensate him, for I have not found any Case where a compensation in Money was considered sufficient.

No Election takes place, first, where the Testator attempts to devise by a Will not duly executed (q); secondly, where an Infant attempts to devise his Real Estate (r); for in these cases the Will not being duly executed the Court cannot read it so far as concerns the *real* Estate, and therefore no evidence of an intention to pass the real Estate appears, and consequently no case of election can be raised; but it has been determined that this doctrine does not extend to the case of an Heir claiming under a Will, and also against it, a Copyhold Estate unsurren-

(l) *Theilsson v. Woodford*, 13 Ves. 220, 1, affirmed on appeal, 1 Dow, 249. *Wright v. Rutter*, 2 Ves. jun. 673. S. C. on appeal, 4 Ves. p. 534. contra *Coll v. Showell*, Ambl. 727. S. C. 3 Wood. Lect. Appendix, 1.

(m) 13 Ves. 221. *Welby v. Welby*, 2 Ves. and Bea. 199. *Lady Caven v. Pultney*, 2 Ves. jun. 560. *Streatfield v. Streatfield*, Forr. 76; *Forrester v. Cotton*, Ambl. 390. 1 Eden's Rep. 535.

(n) *Theilsson v. Woodford*, 13 Ves. 220, affirmed in the House of Lords, 1 Dow, 249.

(o) *Streatfield v. Streatfield*, For. 176. *Welby v. Welby*, 2 Ves. & Bea. 191. In *Green v. Green*, however, 2 Meriv. 86, the Lord Chancellor considered it a question of great importance, whether, where a Party

elects under a Settlement to take one or the other of two beneficial Interests, he is bound in Equity only to make compensation to those who are disappointed by the Election, or to surrender entirely the other part of the Title under which he claims.—The same point arose in *Tibbits v. Tibbits*, 2 Meriv. 96, in note, and remains undecided. On this, and on other points of Election, see the able note of Mr. Swanston appended to his Report of the two cases of *Dillon v. Parker*, and *Gretton v. Hayward*, 1 Swanst.

(p) 2 Meriv. 965.

(q) *Theilsson v. Woodford*, 13 Ves. 223. Ex parte *Earl of Ilchester*, 7 Ves. 372.

(r) As in *Hearle v. Greenknank*, 1 Ves. 298. S. C. 3 Atk. 715.

(1) Vide *Webley v. Langstaff*, 3 Des. 504.

dered, this being determined to be a case of Election (*s*), thought in a subsequent Case it has been said that if it had been *res integra* it would have borne a question (*t*); and in a recent Case it was held, that under general words in a Devise an unsundered Copyhold did not pass, and that the Heir who was benefited by the Will should not be put to an Election (*u*).

An Heir to whom an Estate is devised in Fee, may be put to an Election, although by Law a Devise in Fee, to an Heir, is inoperative (*x*); for if the will is in other respects so framed as to raise a case of Election, then not only is the Estate given to the 51*] *Heir under an implied condition that he shall confirm the whole of the Will, but in contemplation of Equity, the Testator means, in case the condition shall not be complied with, to give the disappointed Devisees, out of the Estate over which he had a power, a benefit correspondent to that of which they are deprived by such non-compliance (*y*). So where an Estate-Tail was devised to the Plaintiff, and an Estate in Fee to the Defendant, the Issue in Tail and Heir at Law, though in strictness he takes by descent, the Heir must, if he chooses to take under the Will, abide by the Will *in toto*, and suffer a Recovery to the use of the Devisee of the Estate-Tail (*z*).

The third instance where no Election takes place is, where there is a Devise for the payment of Debts, in which case Creditors will not be put to an Election (*a*).

If one by Will directs his Lands, which he may afterwards purchase, to be conveyed to the uses of his will, and makes a Provision for his Heir at Law, and afterwards purchases Lands, and does not republish his Will, which Lands descend on such Heir, the Heir will be put to his Election, and will not be permitted to take both the descended Estate and the Provision made for him by will (*b*).

If a Person is under restraint, and cannot elect, the consequence is, that while he continues in that *situation his claim must be barred (*c*). Where the Devisee is an Infant, or Feme Covert, it is usual, if there be any doubt, to refer it to a Master to say which is most for their benefit, taking under, or against, the Will (*d*).

An Election can only take place where a Person has a decid-

(*a*) Ibid. 1 Ves. 298. Frank v. Standish, 1 Bos. C. C. 588, in note. Highway v. Banner, 1 Bro. C. C. 588. Wilson v. Mount, 3 Ves. 191.

(*t*) Pettitwood v. Prescott, 7 Ves. 541.

(*u*) Judd v. Pratt, 13 Ves. 168. S. C. 15 Ves. 390, on appeal.

(*x*) Anon. Gilb. Eq. Rep. 15.

(*y*) Welby v. Welby, 2 Ves. & Bea. 191. In the previous case of Rich v. Cockell, 9 Ves. 369, the

point appears to have been questioned.

(*z*) Wacket v. Cook, at the Rolls, 15 March, 1763, MS.

(*a*) Kidney v. Cousmaker, 12 Ves. 154. Unett v. Wilkes, Amb. 430.

(*b*) Thellusson v. Woodford, 13 Ves. 209, affirmed on appeal to the House of Lords, 1 Dow, 249.

(*c*) Wilson v. Lord John Townshend, 2 Ves. jun. 697.

(*d*) Ibid.

ed Interest before, and something is left to him by Will ;—where there is no certain benefit before, there can be no Election (e).

Many Cases of Election say the Testator must describe the subjects of which he means to dispose ; but in some cases, it seems, parol evidence has been admitted, to show that though the Testator has used words not so descriptive they shall be taken to be descriptive (f). In a recent Case, however, in the House of Lords (g), it was held, that if the words of the Will are satisfied you can go no farther. As, if a Man devise “all his Estate of or at A.” you cannot go into evidence to show he meant other Property than that at A.

If the claim does not break in upon the Will the Party is not put to an Election. *Lord Hardwicke* has stated this Case : Suppose a Child is entitled to a Rent-charge, or such an Interest out of a real Estate belonging to his Father, who makes a Provision for him by Legacy or Portion, and devises that real Estate to another Child, without taking notice of the *Rent- [*53 charge, that Child is entitled to the Rent-charge, as the Father did not show any intent to exclude it ; for that does not defeat the Devise, which the Court will not suffer (i).

If a man devises to B. Lands to which he has no Title, and which are the Estate and in the possession of A. (to whom he gives, by the same Will, other parts of his Estate,) A. must elect, and convey his Estate to B. or he cannot take the benefits under the Will. It is only a modification of this rule where the Testator, who having in his Life-time, by settlement, subjected his Property to particular encumbrances upon it, afterwards devises it free from encumbrances ; and wherever that is done, the Persons who take under the Settlement, or others who derive Interests under the Will, must permit the Estate to go in the new channel which the Will has made. The putting Devisees under a Will to an Election is a strong operation of a Court of Equity ; and the Disposition by the Testator, of what he had no right to dispose of, must appear upon the face of the Will by declaration plain, or by necessary conclusion from the circumstances disclosed by the Will ; for no man is to be deprived of his Property by guessing or conjecture. On the other hand, the Court will not refuse attention to what amounts to a moral certainty of the Testator's intention, where this is to be gath-

(e) See *Crosbie v. Murray*, 1 Ves. jun. 561.

(f) *Druce v. Dennison*, 6 Ves. 399, 400 ; but see *Stratton v. Best*, 1 Ves. jun. 285.

(g) *Doe v. Oxenden*, 4 Dow. 65. The same point was held in *Plump-*

ton v. Ballans, before Vice-Chan. Leach, 18 March, 1819, MS. a case of Election.

(i) *Ayres v. Willis*, 1 Ves. 231 ; and see *Forrester v. Cotton*, 1 Eden, 532. S. C. *Ambl.* 388.

ered either from the state of the Property, or the purview of the Will (*k*).

54*] If a Testator having power to appoint, makes an *appointment by Will, which proves invalid, the Party who takes for want of a due execution of the Power, is not obliged to make satisfaction out of personal Estate, which he took under the same Will in which the invalid appointment was made (*k*).

Where a particular thing is given in discharge of a demand, and the Party insists on the demand, he must waive not only that particular thing, but all benefit which he derives under the whole Will (*l*). But where a Man by his Will gives a Child, or other Person, a Legacy or Portion, in lieu and satisfaction of a particular thing expressed, it has been held not to exclude him from another benefit, though it may happen to be contrary to the Will; for the Court will not construe it in lieu of every thing else, when he has named a particular thing (*m*).

Where a Testator entered into a Marriage Bond to give 2,000*l.* to the Wife and Children, but if no Children, then to the Wife, and he by Will gave her a Life Estate in his whole Property, she was not put to her Election, but took both (*n*).

The Wife being entitled to a settled Estate, the Husband gave her by Will an Interest in another Estate, and all his personal Property, in lieu of her claims. The Will not being duly attested to pass real Estate, she could not take it, but was compelled to elect between the personal Estate which did pass, and the claims under the Settlement (*o*).

55*] If A. in his Will recites the amount of a Debt due from him, and by his Will orders it to be paid, and gives a Legacy to the Creditor, he may claim the Legacy, and yet dispute the calculation of the amount of the Debt by the Testator, whose intent was to pay the whole, and give the Legacy beside (*p*).

If a man is entitled to an Estate, not well devised from him by Will, but by the same Will has a Legacy given to him, and a Power in the Will to a Trustee for him during his minority, and the Legacy is paid to the Trustee, who fails, the Party not having received his Legacy, he will not be put to his Election (*q*).

An Election may, it seems, in some cases, be kept open even for fifty years (*r*). No line can be drawn from mere length of

(*k*) Blake against Bunbury, 4 Bro. C. C. 24, 5. S. C. 1 Ves. jun. 514.

(*l*) Robinson against Hardcastle, 2 Bro. C. C. 344.

(*i*) Graves v. Boyle, 1 Atk. 509, and the cases there mentioned by Lord Hardwicke.

(*m*) East v. Cook, 2 Ves. 33.

(*n*) Forsyth against Grant, 3 Bro. C. C. 242.

(*o*) Newman against Newman, 1 Bro. C. C. 186.

(*p*) Clark v. Guise, 2 Ves. 617.

(*q*) Moore v. Moore, 2 Ves. 603.

(*r*) Lord Beaulieu v. Lord Cardigan, Amb. 533, and on appeal to Lords, 6 Bro. P. C. 232.

time; but it must be from circumstances showing the Intent of the Party (a). In a case where a Widow had conflicting Interest under her Marriage Settlement, and her Husband's Will, and she proved the latter, acted under it, and received Rents for six years, she was considered as having made an Election (t); but merely proving a Will does not operate as an Election to take under the Will (u).

*A Party in whom a right of Election vests may file a [*56 Bill to have the Debts and Legacies paid, and the Property cleared, that he may elect to advantage (x).

It has been holden, that where a Freeman of London makes a Will, unless it be expressly of his *testamentary* part (y), a Child of such Freeman must elect to take by the Custom or by the Will, and could not claim part by one, and part from under the other, but must abide by the Will, *in toto*, or the custom *in toto* (z); and that if the Child elected to take by the Will, the share of such Child, under the Custom, accrued to the Testator's Estate, and went according to his Will (a).

Where a contingent Legacy was given to the Heir, *on condition* not to dispute the Will, and the Will was not executed according to the Statute, the Heir when of age was put to his Election to claim the Legacy, or the Lands devised away (b). Such a condition distinguishes the case from that before alluded to (c), in which it was decided, that where there was a Bequest to the Heir, and a Devise of Real Estate to others, and the Will was good as to the Bequest of the Personal Estate, but void as to the Real, (the Devisor* being an Infant,) the Heir was [*57 not put to an Election.

At Law, a Devise cannot be averred to be in satisfaction of Dower if the Will is silent, nor is *parol Evidence* admissible to show that a sum given to the Wife was intended in lieu of Dower (d); but in some cases a Court of Equity has been induced, by special circumstances, to consider such Devises as a satisfac-

(a) Wake v. Wake, 1 Ves. jun. 335. Buttricks against Broadhurst, 3 Bro. C. C. 90. S. C. 1 Ves. jun. 178.

(t) 3 Bro. C. C. 90. S. C. 1 Ves. jun. 172.

(u) Lord Northington in Lord Beaulieu v. Lord Cardigan, Ambl. 533, held it amounted to an Election, but the House of Lords reversed his Decree. See 6 Bro. P. C. 232; and see what is said in Yale v. Massey, 5 Ves. 433, 4.

(x) 3 Bro. C. C. 90. S. C. 1 Ves. jun. 178.

(y) Biddle v. Biddle, mentioned in note to 1 P. Wms. 533. Frederick

v. Frederick, 1 P. Wms. 732. Carr v. Carr, 2 Atk. 278. Morris v. Burroughs, 2 Atk. 629; but see Babington v. Greenwood, 1 P. Wms. 533.

(z) Cowper v. Scott, 3 P. Wms. 124. Pugh v. Smith, 2 Atk. 43. Harvey v. Desbouverie, For. 130.

(a) Morris v. Burrows, 2 Atk. 627.

(b) Boughton v. Boughton, 3 Ves. 12; and see Carey v. Askew, noticed in Sheddon and Goodrich, 8 Ves. 496, and reported in 1 Cox, 241.

(c) Ante, p. 50.

(d) Finney v. Finney, Serj. Wils. son's Rep. 34.

tion, and the Wife has been decreed to elect (e), after having full knowledge of her rights under the Will (f). The Rule in Equity seems to be, that a Widow cannot be put to an Election to take under the Will of her Husband, or Her Dower, except by express declaration, or necessary inference from the inconsistency of her claim with the Dispositions of the Will (g). The question in all these Cases, in the absence of express words, is, whether the Testator meant to give away his Wife's Dower. It must be seen clearly that he meant to dispose so, that if she should claim Dower it would disappoint the Will. The claim under the Will and of Dower must be repugnant (h). (1) If there is no inconsistency in the two claims—if both may stand together—the Wife is entitled. A Devise, therefore, to the Wife of the Residue of the Testator's personal Estate does not bar the 58*] Wife's claim to Dower (i); nor does a Bequest of *an Annuity (l), (2) or a Devise of all the Testator's real and personal Estate in Trust, in the first place to pay a specified sum to the Wife, prevent her claim of Dower (m); and though a Testator has given to his Wife a provision expressly in bar of any claim she might have against other objects of his bounty, yet if by any accident those objects should be unable to claim the benefit of that exclusion, no other Person can set it up against the Widow

(e) See Co. Litt. 36b. n. 227, approved in *Strahan v. Sutton*, 3 Ves. 251. *Greatorex v. Cary*, 6 Ves. 616. *Foster v. Cooke*, 3 Bro. C. C. 347.

(f) *Chalmers v. Storril*, 2 Ves. and Bea. 225.

(g) *Hitchen v. Hitchen*, Prec. Ch. 133. *French v. Davis*, 2 Ves. jun. 572. *Tinney v. Tinney*, 1 Atk. 8;

and see *Browne and Parry*, 2 Dick. 685, and *Birmingham and Kirwan*, 2 Sch. and Lefr. 450, &c. *Estcourt v. Estcourt*, 1 Cox, 22. *Thompson v. Nelson*, *ibid.* 447.

(h) *Greatorex v. Cary*, 6 Ves. 616.

(i) *Ayres v. Willis*, 1 Ves. 230.

(l) *Greatorex v. Cary*, 6 Ves. 615.

(m) *Thompson v. Nelson*, 1 Cox,

(1) Vide *Adsit v. Adsit*, 2 Johns. Ch. Rep. 448. *Smith v. Kniskern* 4 Johns. Ch. Rep. 9.

(2) Where the testator gave to his wife 500 dollars, "to be left in the hands of his executors, to be paid to her for her support, at any time, or at all times, as her need might require;" and also gave her necessary household goods; and after bequeathing certain pecuniary legacies, directed his farm to be sold by his executors; the wife accepted the legacy, which was paid out of the avails of the farm; it was held, that the legacy was not in lieu of dower, but a mere pecuniary bequest; and that the purchaser of the farm, took it subject to the right of dower. Where a legacy to the wife is not expressly declared to be in lieu of dower, it will not be so intended, unless such intention can be clearly deduced from the provisions of the will. *Adsit v. Adsit*, *ut supra*.

So, where a testator bequeathed to his wife, "her comfortable support and maintenance out of his estate, to be, from time to time, rendered and paid to her by his executors," &c. "during all such time as she should continue his widow, and no longer;" it was held, that though the charge of a "comfortable support and maintenance" might fall as well on the real, as on the personal estate, it did not affect the widow's right of dower, there being nothing in the provisions of the will, inconsistent with the validity of both claims. *Smith v. Kniskern*, *ut supra*.

(n). Where a Testator gave his Wife real and personal Property in bar of her Dower or thirds, and bequeathed the residue to Charities, which Bequest was void under the Statute, it was held that the Widow was not to be put to an Election (o). Notwithstanding the doctrine on which *Lawrence v. Lawrence* (p), (the leading Case on the subject) was finally decided, and the frequent recognition of that Case, Devices have often since been deemed a satisfaction of Dower, on account of very strong and special circumstances, as, where allowing the Wife to take a double provision would have been quite inconsistent with the dispositions of the Will (q); but from the final Decision in *Lawrence v. Lawrence* it may be inferred, that a mere Gift by the *Husband to the Wife of a larger amount than the Dower, [*59 is no bar of Dower, but that she may claim both (r).

It has been much controverted, whether a *Rent-charge* given to the Widow, issuing out of the Estate subject to Dower, with power of Distress, operates as a bar, or satisfaction of her Dower. Lord Northington (s), Lord Camden (t), Sir Thomas Sewell (u), and Mr. Justice Buller (x), seem to have considered such Devise as a satisfaction of the Dower; but Lord Hardwicke (y), Lord Bathurst (z), Lord Rosslyn (a), Lord Thurlow (b), and Lord Alvanley (c), thought it would not be a satisfaction of the Dower. Amidst such a collision of authorities it is difficult to decide; but the prevailing opinion of the Profession appears to be in favour of the Wife. In cases, however, of this sort, no Purchaser can be advised to accept a Title without a Release of the Dower (d).

The Gift of an Estate to any person, not the Wife, does not exclude her from claiming Dower out of that Estate, and at the same time taking under the Will (e). But where an Annuity

(a) *Pickering v. Lord Stamford*, 3 Ves. 332.

(o) *Ibid.* S. C. on appeal (*ibid.*) 492.

(p) 2 Vern. 365, reversed by Lord Keeper Wright, and the reversal affirmed, 1 Bro. P. C. 591. The case of *Vizard v. Longdale*, contra, mentioned 3 Atk. 8, and 1 Ves. 55, appears to have been considered of no high authority. See *Couch v. Stratton*, 4 Ves. 394.

(q) As in *Arnold v. Kempstead*, Ambl. 466. S. C. 2 Eden, 236. *Villareal v. Lord Galway*, Ambl. 682, but said not to be clearly reported there. (2 Sch. and Lefr.) See, however, the judgment in that case fully reported in 1 Bro. C. C. 292. in note. *Wake v. Wake*, 3 Bro. C. C. 255, S. C. 1 Ves. jun. 335. *Chalmers, v. Storril*, 2 Ves. and Bea. 224, 5.

(r) See what is said in *Erench v. Davies*, 2 Ves. jun. 578. 2 Atk. 427.

(s) See *Arnold v. Kempstead*, Ambl. 466. S. C. 2 Eden, 236.

(t) See *Villareal v. Lord Galway*, Ambl. 466. 682.

(u) *Jones v. Collier*, Ambl. 466, 682, 730.

(x) See *Wake v. Wake*, 3 Bro. C. C. 255. S. C. 1 Ves. jun. 335.

(y) See *Pitt v. Snowden*, mentioned 3 Ves. 252, and 1 Bro. C. C. 292.

(z) *Davis v. Edwards*, mentioned Arg^o 1 Bro. C. C. 292.

(a) See *Pearson v. Pearson*, 1 Bro. C. C. 292.

(b) See *Foster v. Cook*, 3 Bro. C. C. 347.

(c) *French v. Davies*, 2 Ves. jun. 578, 579; and see *Greatorex v. Cary*, 6 Ves. 615.

(d) 3 *Preston on Abstracts*, 378.

(e) *Strahan v. Sutton*, 3 Ves. 249. *Hitchen v. Hitchen*, Pre. Ch. 133. 2 Freem. 241.

60*] was given to the *Wife, charged upon a devised Estate, to part of which she was entitled in Tail, she was put to her Election (f).

If a Man devise to his Wife certain Lands, Money, Goods, &c. in lieu and satisfaction of Dower, the Wife cannot have both; but she may wave the Devise and claim Dower, or take the Devise in lieu of Dower, at her Election (g). (1).

Where a Party has made an Election, and proceeds, contrary to such Election, to recover Estates at Law, an Injunction will be granted to restrain him (i).

Charitable Legacies.

Charitable Bequests are next deserving of attention. All Dispositions (with some exceptions mentioned in the Act) of real Estate to Charity, and personal Estate connected with Land, as Leaseholds (k) and Mortgages (though included in a general residue) (l), are rendered void by the Statute of 9 Geo. 2, c. 36, usually termed the *Mortmain Act* (m).

The Statute contains no express words prohibiting a Bequest of Money, to be produced by the *Sale of Land* for charitable 61*] purposes; but is settled by *construction, that such a Bequest is within the spirit and meaning of the Act (n).

Money may be bequeathed to be laid out in Lands abroad, for the maintenance of a *foreign Charity* (o), or for a Charity in *Scotland* (p). Nor does the Act extend to any of the *Colonies*, it being held, that Land there, may be legally devised to a charitable Use, the Mortmain Act being one of local policy, and applicable only to England (q).

Where a Devise is void by the Statute of Mortmain, the Pro-

(f) *Wilson v. Lord John Townshend*, 2 Ves. 693.

(g) 1 Chan. Cas. 128. 2 Cha. Cas. 24. 1 Ventr. 340. 4 Co. 1 Vernon's case.

(i) *Green v. Green*, 2 Meriv. 86.

(k) *Attorney-General v. Tomkins*, 1 Ambl. 206. *Attorney-General v. Graves*, M.B.

(l) *Attorney-General v. Winchelsea*, 3 Bro. C. C. 372.

(m) The Statutes of Mortmain began with *Magna Charta*; 36. Hen. c. 36; then followed, 7 Edw. 1. c. 3; 13 Edw. 1 stat. 1. c. 23; 18 Edw. 1. c. 3; 34 Edw. 1. stat. 3; 18 Edw. 3 stat. 3; 15 Rich. 2. c. 5; 23 Hen. 8. c. 10. sec. 2, 3, 4, 5; 7 and 8 Will. 3.

c. 37; and concluding with 9 Geo. 2. c. 36.

(n) See *Attorney-General against Lord Weymouth*, Amb. 30, and 14 Ves. 541.

(o) *Admitted Argu^o*. 14 Ves. p. 540. *Oliphant and Hendrie*, 1 Bro. 571.

(p) *Mackintosh v. Townshend*, 16 Ves. 330. *Attorney-General v. Lord Weymouth*, Ambl. 20. *Attorney-General v. Lepine*, 19 Ves. 309.

(q) *Attorney-General v. Stewart*, 2 Meriv. 156. I have a copy of an opinion of Mr. Attorney-General Pratt, afterwards Lord Camden, in which he was clear that the Statute of Mortmain did not apply to Jamaica.

(1) A widow taking a legacy, and waiving dower, may again set up her claim to dower, if the legacy fail through deficiency of assets. *Gist. v. Catell*, 2 Des. 53.

perty according to its nature, will go to the Heir at Law, or next of Kin (r); but if money be charged, in favour of a Charity, on a real Estate devised to A., it sinks in favour, not of the Heir, but of the specific Devisee (s).

The *Mortmain Act* commonly, though not properly, so called (t), is founded upon good sense and sound policy (u). It has indeed been termed, "*a Barbarous Act*;" but it is quite otherwise. Far from being a prohibition of charitable foundations, it only restrains the creation of them by "languishing *and [*62 dying persons to the disherison of Heirs (x):" it does not prevent Charity, but the abuse of it (y). If a Man is charitable, he may by *Deed* convey Real Estate to a Charity (z), provided the Deed be executed a year before the death of the Grantor, and enrolled within six months after the execution (a); nor is such Deed void by reason of a reservation to the Grantor of a power of regulating the Charity (b); and it is sufficient that the Deed is executed by the Grantor at the time of the enrolment, and need not be executed by the Grantees (c); and where a Grant was made twelve months before the Grantor's death, and duly enrolled, of a House and Premises to T. C. in Trust for the Rector of G. it was held valid, though the Grantor himself was Rector of G. at the time of the Grant (d). Personal Property may be disposed of as before the Statute (e). The particular views of the Legislature were two; first, to prevent the locking up of Land, and real Property, from being alienated, which is made the title of the Act; the second, to prevent persons in their last moments from being imposed on to give away their real Estates from their Families; for in times of Popery the Clergy got almost half the real Property *of the Kingdom [*63 into their hands: "and, indeed," says *Lord Hardwicke*, "I wonder they did not get the rest; as people thought they thereby purchased Heaven (f)."

Nothing is more clearly established than that under this Statute no Interest whatever, or Charge, or Encumbrance on real Estate, can be given for a charitable use by *Will* (g). A

(r) *De Costa* against *De Pas*, Ambl. 228; and see *Corbyn v. French*, 4 Ves. 433. *Gibbs v. Rumsey*, 2 Ves. & Bea. 296. *Middleton v. Cater*, 4 Bro. C. C. 409.

(s) *Wright v. Row*, 1 Ves. jun. 51.

(t) *Thelluson v. Woodford*, 4 Ves. 340.

(u) Per Lord Northington in *Attorney-General v. Tyndall*, 2 Eden, 210.

(z) See *Attorney-General v. Lord Weymouth*, Ambl. 23. *Attorney-General and Day*, 1 Ves. 223; and see *Attorney-General and Bowles*, 3 Atk. 806.

(y) Ambl. 158, and 639; and see 4 Ves. 427, and *Attorney-General v. Merrick*, 1 Ves. sen. 47.

(x) *Blandford v. Thackerall*, 2 Ves. jun. 241.

(a) Ambl. 23.

(b) *Grievess v. Case*, 2 Cox, 301.

(c) *Ibid*.

(d) *Attorney-General v. Munby*, 1 Meriv. 327.

(e) See 1 Ves. 223.

(f) 1 Ves. 223.

(g) *Pickering v. Lord Stamford*, 2 Ves. jun. 279. *Attorney-General v. Meyrick*, 2 Ves. sen. 44.

Legacy, therefore, to a Charity, charged on Real Estate, is void (*h*).

As a charitable Legacy secured by *Mortgage* is void (*i*), and a Bequest to pay off a mortgage on a charity Estate is void (*k*), so Money secured by an Assignment of the *Poor Rates* and *County Rates* is within the Statute, and will not pass under a Bequest to a Charity (*l*). It is the same as to *Navigation Shares* and *Turnpike Bonds* (*m*).

A Bequest of Money to purchase Ground, and build *Alms-Houses* is void under the Statute; nor can it be sustained by a Bequest to a charitable society, "provided they will furnish a piece of Ground to build the *Alms-Houses*," that being in effect 64*] the same thing (*n*). So a Legacy "towards*the erecting and endowing of an Hospital" is within the Statute (*o*); but where Money was left to erect a *Blue-Coat School* and establish a *Blind Asylum*, with a direction that Lands should not be purchased, and an expectation expressed that Lands would be given for the Charities, the Bequest was considered as valid (*p*); (*l*) and where a sum was given to be laid out in the Funds, and the Dividends applied in providing a proper School-house, the Bequest was considered as effectual, as a School-house might be hired (*q*).

Where the principal Devise, as of *Land*, fails, a Bequest of personal Property connected with it fails also—if the primary Bequest fails, the subsidiary part falls with it (*r*)—but not where the personal Property can be separately applied within the terms of the Will (*s*).

Where Lands were directed to be purchased, and a *School* to be erected, the direction to *purchase* being void, the Trustees offered themselves to purchase the Land upon which a School

(*h*) Currie v. Pye, 17 Ves. 462.

(*i*) Attorney-General v. Meyrick, 2 Ves. 44. Pickering v. Lord Stamford, 2 Ves. jun. 272, and 581. S. C. 4 Bro 214. Ambl. 158; and see Ambl. 368; and also 16 Ves. 336.

(*k*) Corbyn v. French, 4 Ves. 418.

(*l*) Finch v. Squire, 10 Ves. 41.

(*m*) Howse v. Chapman, 4 Ves. 542, as to money secured on Turnpike-tolls; see also Knapp v. Williams, 4 Ves. 430, in note.

(*n*) Attorney-General v. Davies 9. Ves. 541, 2. Attorney-General v. Parsons 6 Ves. 191 Attorney-General v. Tyndall, Ambl. 616. S. C. Eden's Rep. 207; but see what is

said in 2 Ves. 189. Grieves v. Case, 1 Ves. jun. 548. S. C. 4 Bro. C. C. 67.

(*o*) Foy v. Foy, 1 Cox, 165.

(*p*) Henshaw v. Atkinson, 3 Madd. Rep. 306.

(*q*) Johnston v. Swann, 3 Madd. Rep. 457.

(*r*) See Attorney-General v. Whitchurch, 3 Ves. 141. Attorney-General v. Davis, 9 Ves. 543, 545. Chapman v. Browne, 6 Ves. 404; and Grieves and others against Case, 4 Bro C. C. 67.

(*s*) Attorney-General v. Stepney, 10 Ves. 29.

(1) A bequest of a sum of money to a town, for the purpose of building a town house, for the transaction of public business, is valid as a charitable bequest. Coggeshall v. Felton, 7 Johns. Ch. Rep. 292.

might be erected ; but upon the rule alluded to, all the Bequest was considered as void (*t*).

A Bequest of Money to *establish a School* has been held good, as the Master may teach in his own *House, or in the [*65 Church (*u*). So Money given to *improve* Charity Lands (*x*), or for re-building, re-pairing, altering, or adding to and improving Land already in Mortmain, is a valid Bequest, but does not authorize the purchase of Land (*y*). A Bequest of Money to enable a Trustee for a Charity to complete a Contract for the purchase of Land, would be void (*z*).

A Bequest for the purpose of building a Chapel upon Ground *already in Mortmain*, is legal ; though a Bequest to purchase Ground for the purpose of building a Chapel is not legal (*a*). In one case (*b*), it has been held, that if there is a Bequest of Money to be laid out in building a Chapel or School, the intention is taken to be, to build, in case a piece of Ground, already in Mortmain, could be found for the purpose, but that doctrine has been overruled (*c*).

If there be a Bequest of Money to a Charity, and a direction to lay it out in the public Funds, until the whole can be laid out in the purchase of Lands *to the satisfaction of the Trustees, [*66 this has been held not to be within the Statute of Mortmain, the Trustees being considered as not obliged to lay out the Money in Land (*d*) ; but Money directed to be invested until an eligible Purchase could be had was held to be a Devise of Land, and bad (*e*). A Bequest of Money to be laid out in Land, or some real Security, for a Schoolmaster, has been held to be void under the Statute (*f*).

If a large Personal Estate is left to Trustees for a charitable

(*t*) Attorney-General against Nash, 3 Bro. C. C. 588. S. C. mentioned in Attorney-General v. Davies, 9 Ves. 542. Pelham v. Anderson, 2 Eden, 296.

(*u*) Attorney-General against Williams, 4 Bro. C. C. 526. S. C. 2 Cox, p. 387.

(*x*) Attorney-General v. Nash, 3 Bro. C. C. 595 ; and see what is said, 2 Ves. 189.

(*y*) Attorney-General v. Parsons, 8 Ves. 186 ; and see Harris v. Barnes, Ambl. 651. Pelham v. Anderson, 2 Eden, 296 ; and Attorney-General v. Bishop of Chester, 1 Bro. C. C. 444 ; and see Corbyn v. French, 4 Ves. 427, 8. 2 Ves. 189. Foy v. Foy, 1 Cox. 165. Attorney-General v. Munby, 1 Meriv. 345.

(*z*) Corbyn v. French, 4 Ves. 431.

(*a*) Chapman v. Browne, 6 Ves. 407.

(*b*) Attorney-General v. Bowles, 2 Ves. 547. S. C. 3 Atk. 805.

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(*c*) Capman v. Browne, 6 Ves. 409, and authorities there cited, such as Attorney-General v. Tyndall, Ambl. 614. Attorney-General v. Hutchinson, Ambl. 751. 1. Bro. C. C. 444, in note. Pelham v. Anderson, 1 Bro. C. C. 444, in note. Foy v. Foy, 3 Bro. C. C. 591. S. C. 1 Cox. 63. See observations in Attorney-General v. Whitchurch, 3 Ves. 144, and Attorney-General v. Parsons, 8 Ves. 191.

(*d*) Grimmett against Grimmett, Ambl. 210. In Grievs v. Case, 1 Ves. jun. 551, Lord Commissioner Eyre said, "this Case stood upon so much nicety, that it is not proper to extend it to Cases in which every part of the circumstances of that Case does not occur."

(*e*) Grievs & others v. Case, 4 Bro. C. C. 67. S. C. 2 Cox, 301, and 1 Ves. jun. 548.

(*f*) Attorney-General v. Bowles, 3 Ves. 547.

use, which they are to direct, and there is no occasion to come to a Court of Equity for a direction, there is nothing in the Statute restraining the Trustees from laying that out in Land, because by the express proviso of the Act, all Purchases to take effect in possession are good; which, says *Lord Hardwicke* is a matter, perhaps, that may want a Remedy (g).

In cases where Money given in Charity is to be disposed of in such manner as *the Executors or Survivors shall think fit*, it is considered as a personal Trust which dies with the Executors (h); and on their death, the King becomes entitled to the disposition of the Fund, by his *Sign Manual* (i).

67*] If an Heir at Law confirms a Devise of Land to a *Charity, the Court will not take it away, for it becomes the Act and Deed of the Heir (k).

A Devise to a *College* is not affected by the *Mortmain* Act, it being expressly excepted (l); but if the Devise is not beneficially, but in Trust, for other objects, it is not protected by the statute (m).

If there be a charitable Gift to two purposes, the one good and the other bad, the Court will apply the Money to the good use (n).

A Citizen of *London* may, under the *custom*, devise Land situated in *London*, in *Mortmain*; but not Land out of *London* (o).

A Bequest of Money to be laid out in Land, for the support of the Preachers of two Chapels, has been held to be a charitable use within the Statute of *Mortmain* (p); but a Bequest of personalty in Trust, for the benefit of a *dissenting Congregation*, is enforceable in Equity (q), whether *Quakers*, *Baptists* (r), or others (s); but it is doubtful whether such a Bequest in support of *Socinianism* would be good (t).

A Bequest to *poor Relations* may be sustained as a Charity 68*] (u); and a Legacy to the *poor Inhabitants* *of a particular Pa-

(g) *Vaughan v. Farrar*, 2 Ves. 188, 189.

(h) *Hibbard against Lambe*, Amb. 309.

(i) *Attorney-General v. Berryman*, 1 Dick. 168.

(k) *Amb. 158*.

(l) *Attorney-General v. Andrew*, 3 Ves. 641, 9. *Attorney-General v. Tancred*, Amb. 352. S. C. 1 Bl. 30 & 1 Eden, p. 10.

(m) *Attorney-General v. Munby*, 1 Meriv. 344. *Attorney-General v. Tancred*, 1 Eden, 15.

(n) *Attorney-General against Hartley*, 4 Bro. C. C. 412.

(o) *Middleton against Cater*, 4 Bro. C. C. 409.

(p) *Grievs v. Case*, 4 Bro. C. C. 67. S. C. 2 Cox, 301.

(q) *Attorney-General v. Fowler*, 15 Ves. 88. *Attorney-General v. Hickman*, E. 1732. MS.

(r) *Attorney-General v. Lord Dudley, Coop.* 146.

(s) *Attorney-General v. Cook*, 2 Ves. 273.

(t) See *Attorney-General v. Pearson*, 3 Meriv. 353.

(u) *White v. White*, 7 Ves. 423. See *Attorney-General v. Price*, 17 Ves. 371; and see *Isaac and De Friez*, *ibid.* p. 373, in note, imperfectly and erroneously reported in Amb. 595.

rich has been holden good, and to go to the Poor not receiving alms (x).

A Bequest to the *Governors of Queen Anne's Bounty* is void under the Statute of *Mortmain*, because all their Funds must be laid out in the purchase of Estates (y).

A Devise of 500*l.* to the Church of *St. Helens* was determined to be good, and that it belonged to the Churchwardens, to be employed by them in the repairing and adorning of the Church (z). So, a Bequest to establish a *Life-Boat* at Brighton has been held good (a).

A bequest of 1000*l.* by Sale of Lands, to be applied in Water-Works for the use of the Inhabitants of a Town, is within the Statute of *Mortmain*, and void (b).

A Bequest of a residue to be employed in such *charitable uses* as the Executor shall think proper, is a good Bequest (c); but a Bequest for such objects of *benevolence* and *liberality* as the Trustee in his discretion shall approve, cannot be supported as a *charitable Legacy*, but is a trust of the next of kin (d).

A grant of Lands in Trust, perpetually to repair, and, if need be, rebuild, a vault and tomb standing on the Land, and permit the same to be used as a *family vault for the Donor and [*69 her family, is not a charitable use within the *Mortmain Act* (e). If there be in a Deed one Limitation to an Use which is a charitable Use within the 9 Geo. 2. c. 36, that statute does not therefore avoid other Limitations in the same Deed, which are not within the Act (f).

Where Property is bequeathed for a charitable purpose the law will not allow, as for instance, the support of a *Jewish Synagogue* (g), or for the education of poor Children in the *Catholic faith* (h), the Court, though it will not support such Bequest, will yet apply it to purposes of Charity, upon the ground, (not a very satisfactory one) (i), that as the Property was meant for

(x) *Attorney-General v. Clarke*, Ambbl. 422.

(y) *Middleton v. Clitherow*, 3 Ves. 734. *Widmore against Woodroffe*, Ambbl. 636.

(z) *Attorney-General v. Ruper*, 2 P. Wms. 125.

(a) *Johnston v. Swann*, 3 Madd. Rep. 457.

(b) *Jones against Williams*, Ambbl. 651.

(c) *Chapman v. Brwone*, 6 Ves. 410.

(d) *Morris v. Bishop Durham*, 9 Ves. 410.

(e) *Morris v. Bishop Durham*, 9 Ves. 399, and S. C. on appeal, 10 Ves. 522.

(f) *Doe v. Pitcher*, 6 Taunt. 359; and see 3 Maule and Selwyn, 407.

(g) *Ibid.*

(g) *De Costa v. De Pas*, Ambbl. 228.

(h) *Cary v. Abbott*, 11 Ves. 490.

(i) This doctrine was first broached I believe, in the case of the celebrated Nonconformist, *Baxter*, 1 Vern. 248. 2 Vern. 105; but was disapproved by Lord Thurlow, in *Moggridge v. Thackwell*, 1 Ves. jun. 468; and see *Attorney-General against Goulding*, 2 Bro. C. C. 230. See also the sarcastic remark of the Master of the Rolls on this doctrine, 11 Ves. 495, and what Lord Eldon says in *Moggridge and Thackwell*, 7 Ves. p. 81, and Lord Alvenley, in *Attorney-General v. Minshull*, 4 Ves. 14; see *Attorney-General v. Whiteley*, 11 Ves. 251, and *Attorney-General v. Andrew*, 3 Ves. 533. 7 Ves. 223. 9 Ves. 525. There are some important ob-

a *Charity*, though it could not be applied to the particular *Charity* mentioned, it shall be applied to a *Charity* pointed out by the Court. Thus, the Legacy for the support of a *Jewish Synagogue* was given to the *Foundling Hospital*! But this doctrine does not apply as to Legacies to *charitable Uses* made void by the Statute of *Mortmain* (*k*).

70*] *Where it appears by a Will that the substantial intention of a Testator is *Charity*, though the mode in which it is directed to be executed fails, by accident, or other circumstances (*l*), the Court will find some means of effectuating that general intention (*m*). But if the Court can find, or may hereafter find (*n*), any means of applying the charitable fund to the *Charity* as created by the Founder, it will not, upon any general notion that any other application would be more beneficial to the Inhabitants of the place, change the nature of the *Charity* (*o*); for it is a Rule, that the intent of the Founder of a *Charity* must be strictly followed (*p*).

If a Man bequeaths a sum of Money to such charitable Uses as he shall direct by a Codicil to be annexed to his Will, or by a note in writing, and afterwards leaves no such direction, either by note or Codicil, the Court of Chancery hath power to dispose of it to such charitable Uses as the Court shall think fit (*q*). So where a Testator directed the residue of his Estate to be divided for certain charitable purposes mentioned by him, "and other charitable purposes as I do intend to name hereafter," 71*] *and he afterwards makes a Codicil, and names no charitable purpose, the Court will carry into execution the disposition of the residue in favour of the *Charity* (*r*). These cases are so determined because it is a *charitable Bequest*; and the same construction does not apply in the case of individuals; for if property be given by Will to such person as the Testator should afterwards name to be his Executor, and afterwards appoints no Executor; or if having appointed an Executor he dies in the Testator's Life-time, and he appoints no other to supply his place, in either of these cases, as to individuals, the Testator would be held intestate, and his next of kin will take the property. But to give effect to a *Bequest* in favour of *Charity*,

servations on this point by Chief Justice Wilmot, in Wilmot's Rep. 32, 3.

(*k*) Corbyn v. French, 4 Ves. 433.
(*l*) See Attorney-General and Sinderlin, 1 Vern. 224.

(*m*) Moggridge v. Thackwell, 7 Ves. 69, 82. Mills v. Farmer, 1 Merivale's Rep. 95, 100; and see Attorney-General v. Boyer, 3 Ves. 729, and Attorney-General v. Boulton, 2 Ves. 388, and 3 Ves. 220; and see Attorney-General v. Whitchurch, 3 Ves. 141, and Attorney-General

against Green, 2 Bro. C. C. 492. Attorney-General v. Pyle, 1 Atk. 436. Attorney-General v. Wansay, 15 Ves. 231. Attorney-General v. Painter Stainers Company, 2 Cox, 51.

(*n*) See Attorney-General against Oglander, 3 Bro. P. C. p. 166.

(*o*) Attorney-General v. Whiteley, 11 Ves. 251. See Attorney-General v. Minshull, 4 Ves. 14.

(*p*) 1 Vern. 55, 56.

(*q*) Freem. 330.

(*r*) Mills v. Farmer, 1 Mer. 55.

the Court will in both instances supply the place of an Executor, and carry into effect that which, in the case of individuals, must have failed altogether (s).

If there is one particular object to which a Testator's mind applies, as the building of a Church at *Wheatley*, and that purpose cannot be answered, the next of kin must take, there being in that case *no general charitable intention*; but where the Testator intends to give all generally to charitable purposes, the increase will go *cy-pres* (t).

In a case, therefore, where the Fund devoted to Charity became very considerable in proportion to the objects, the application of the Fund was, upon the principle of *cy pres*, extended against the claims of the next of kin, for the benefit of the same *objects, to purposes not expressly pointed out by the [*72 Will (u).

Where the Fund given to Charity is exhausted by the purpose declared at the time, but is afterwards increased by the improved annual produce, and the Will contains no direction as to the disposition of the Surplus thus created, the Court holds that the Testator, who gave the whole value of the Fund, such as it was at the time to a charitable purpose, has divested all claims of his Representatives; and the Court reserves to itself the disposition of such a Surplus, with a view of taking care that it shall be applied, under the controul of the Court, as nearly as possible to the uses and purposes to which the Testator meant his property to be subservient (x).

If there be a Charity for a select number of Alms-People, and there are not persons sufficient to answer the description of the Charity, the Land charged with the payment of the Charity is not discharged during that time, but shall accumulate and be applied towards the advancement and increase of the Charity (y).

The Court of Chancery is said to have a general Jurisdiction over Charities, by issuing a commission, and likewise can give directions for the Management *of a Charity; but this does not extend to Charity Schools, where *local visitors* are appointed (z).

Where the King is founder of a Charity, his Majesty and his

(s) Ibid. 94.

(t) Attorney-General v. Hurst 2 Cox, 366.

(u) Bishop of Hereford v. Adams, 7 Ves. 324; and see Attorney-General v. Earl of Winchelsea, 3 Bro C. C. 573. Attorney-General v. Hirst, 2 Cox, 364.

(x) Attorney-General v. Coopers Company, 19 Ves. 189; and see Attorney-General v. Mayor of Bristol, 3 Madd. Rep. 319. Attorney-General v. Mayor of Coventry, 2 Vern. 400

For the argument, *contra*, of Lord Chief Justice Holt, see 3 Madd. Rep. p. 353.

(y) Aylett v. Dodd. 2 Atk. 238. Attorney General and Johnson, Ambl. 190. Attorney-General v. Sparkes, Ambl. 201.

(z) Attorney-General v. Price, 3 Atk. 108; and see Attorney-General v. Myddleton, 2 Ves. 329. Attorney-General v. Corporation of Bedford, 2 Ves. 505.

Successors are *Visitors*, and the right of visiting is exercised by the Chancellor upon a Petition for that purpose (a); but it is not in the *Court of Chancery* that the King's visitatorial power is to be exercised, it is by the Lord Chancellor (b); and therefore a Solicitor's Bill, in respect of proceedings before the Chancellor in his visitatorial character, cannot be taxed under the Statute (2 Geo. 2. c. 23, s. 22,) it not being a proceeding in *Law or Equity* within the Statute (c).

But wherever a *private Person* is founder, such private Person and his Heirs are, by implication of Law, Visitors; it is a Common-Law right (d); but the founder may vest such *visitatorial right* in any other person, or his Heirs (e); nor are any particular words required to create a *Visitor*—it is sufficient if the intention of the Founder appears who should be Visitor, technical words not being necessary (f).

Where, owing to the failure of Heirs, there is no special Visitor, the Lord Chancellor will act, as in cases where his Majesty is by foundation, special Visitor (g).

74*] If the Charity is not vested in the persons who *are to partake, but in Trustees for their benefit, no Visitor arises by Implication, but the Trustees have that power (h).

Another person may graft upon a former Charity, and by express words, or necessary implication, subject the Estate or Emolument given by him to the same visitatorial power, and to be governed by the same Rules (i).

The founder may give a general power, or may limit and bind by particular Statutes and Laws; he may give the Visitor a power of altering or giving new Statutes, or may restrain him from doing it, or from acting according to any other (k). If the power to the visitor is unlimited and universal, he has, in respect of the foundation and property moving from the founder, no rule but his own discretion; but if there are particular Statutes, they are his Rule, and he is bound by them; and if he acts contrary to, or exceeds them, he acts without Jurisdiction (l), and what he does is a nullity (m).

No Court of Law or Equity can anticipate the judgment of the Visitor, or take away his Jurisdiction (n); his determination is final and conclusive. This power may be, and often has

(a) Attorney-General v. Black, 11 Ves. 193.

(b) Ex parte Dann, 9 Ves. 548.

(c) Ibid. 547.

(d) Skin. 481.

(e) Eden v. Foster, 2 P. Wms. 325; and see Attorney-General v. Price, 3 Atk. 108.

(f) See 3 Atk. 662. Attorney-General v. Middleton, 2 Ves. 328; and see 1 Burr. 201.

(g) Ex parte Wrangham, 2 Ves. jun. 619.

(h) 1 Ves. 492.

(i) Ibid. 472, 3.

(k) See Skin. 454.

(l) Green and Rutherford, 1 Ves. 472.

(m) See 2 Durnf. and East, 348.

(n) See Phillips and Bury, Show. P. C. 51. 4. Mod. 112, 413.

been abused (o); *but if it is discreetly exercised it is a more [*75 convenient remedy than that by Suits at Law or in Equity, and for that reason ought to be supported (p), but being summary and arbitrary, ought not to be extended (q). Local Visitors do not visit but from three years to three years; but they may, if they please, hear complaints within that time (r).

In those cases where the Governors or *Visitors* are said *not to be accountable*, it must be intended where such Governors have the *power of government only*, and not where they have the *legal Estate, and are intrusted with the receipt of the Rents and Profits*; in respect of which it is established they are to be considered as *Trustees*, and are accountable for a breach of Trust (s).

Corporations for charitable purposes, therefore, being considered as *Trustees* (t), if by conveyances they have abused the Trust, such alienation, though good at Law, is bad in Equity, and the Alienee will be considered as a Trustee. But it seems this doctrine does not extend to Corporations holding for purposes not charitable, for Corporations in such cases are not considered as *Trustees* (u).

*Where one seised of a Manor granted a Rent in Fee [*76 out of it, as a Charity, for the support of several poor persons, and he afterwards granted the Manor to J. S. in Fee, the nomination of poor persons was held to belong to the Heir of the Grantor, and did not go with the Manor (x). So if a Man founds a Charity for Alms-houses, the Founder and his Heirs have a right of nomination; but it may be forfeited by a corrupt or improper nomination of such as are not fit objects of the Charity, or by making no nomination at all, provided the founder, &c. has had notice of the vacancy (y).

Where there is a *Bequest to Trustees* for charitable purposes, the Court of Chancery upon an *Information* administers the

(o) In the course of the inquiry into the abuses of Charity by a Committee of the House of Commons, many instances were produced of great neglect of duty in visitors; so much so indeed, as to show the necessity of Legislative interference. See on this and other subjects connected with the abuse of Charities, a Letter to Sir Samuel Romilly, from H. Brougham, Esq. M. P. 11th edit. 1818.

(p) *Attorney-General v. Talbot*, 3 Atk. 662. S. C. 1 Ves. 78. 1 Ves. 475.

(q) 2 Ves. 328.

(r) *Attorney-General v. Price*, 3 Atk. 108.

(s) *Eden v. Foster*, 2 P. Wms. 326, and vid. case of the Hospital of Sut-

ton Coldfield, Duke, Char. Uses, p. 684, and *Hynshaw and Pydwers v. Mayor and Corporation of Morpeth*, Duke, p. 69. *Attorney-General v. Lock*, 2 Atk. 165. *Attorney-General v. Foundling Hospital*, 2 Ves. jun. 47. S. C. 4 Bro. C. C. p. 167. *Attorney-General v. Dixie*, 13 Ves. 519. *Berkhamstead Free School*, 2 Ves. & Bea. 138.

(t) *Lydiat v. Sir John Foach*, 2 Vern. 412. *Attorney-General v. Corporation of Bedford*, 2 Ves. 505.

(u) Vid. *The Mayor of Colchester v. Lowten*, 1 Ves. and Bea. 246.

(x) *Attorney-General v. Rigby*, 3 P. Wms. 146.

(y) *Attorney-General v. Leigh*, 3 P. Wms. 146, note a.

Trust, and a scheme for that purpose is laid before the Master; but where the Testator's object is charity, and *no Trust is interposed*, the Trust is then administered by *sign manual* (z).

Where a Residue is to be applied, the Court frequently directs a scheme, even where an unlimited discretion as to distribution is left to a Trustee, and where consequently a scheme can answer no purpose but to show that the whole Fund is applied to the proper objects (a); but where part of an annual and temporary Income is to be disposed of from year to year, according to a discretion to be exercised every year, and possibly every day, a scheme is not directed, but parties are left at liberty to apply to the Court in case of any misapplication (b).

The only way of administering the Charity is under general directions to Trustees; and in case of misbehaviour there must be another Information upon the new ground, for the Court will not keep the Information under the direction of the Court, to be executed from time to time (c).

In a case where a Corporation, Trustees of a Freehold Estate for the benefit of a Charity, had misapplied the increased Revenues, and grossly misbehaved themselves in the execution of their Trust, and were unable to pay the sums due from them, in consequence of their misapplication and misbehaviour the Court directed the Trust Estate to be conveyed to Persons more able and willing to execute the Trust faithfully for the benefit of the Poor (d).

But though Corporations constituted Trustees may be divested of their Trust for an abuse of it, yet the Court cannot divest them of their corporate character and capacity; that, it seems, can only be done on a Petition to the Lord Chancellor in his visitatorial capacity (e). Courts of Equity having no Jurisdiction with regard either to the Election, or the amotion of Corporators of any description (f).

78*] We shall hereafter have occasion to advert more particularly to Breaches of Trust by Trustees of a Charity.

(z) Paice v. The Archbishop of Canterbury, 14 Ves. 372, and Mogridge and Thackwell, 7 Ves. 36, 86; see also Attorney-General against Herrick, Amb. 712; and see Attorney-General v. Pearce, 2 Atk. 87. Cook v. Duckenfield, 2 Atk. 569; and see 2 Freem. 261. In Cox v. Bassett, 3 Ves. 155, a legacy for a general charity purpose was held void, as being undefined.

(a) Waldo v. Caley, 16 Ves. 211.

(b) Waldo v. Caley, 16 Ves. 211; and Supple against Lowson, Amb. 729.

(c) Attorney-General v. Haberdashers Company, 1 Ves. jun. 295; but see Attorney-General v. Harrow School, 2 Ves. 552, where the information was not dismissed, in order to keep a hand over the parties.

(d) Mayor, Bailiffs, and Commonality of the City of Coventry and Attorney-General, 7 Bro. P. C. 235. Toml. Edit.

(e) Attorney-General v. Earl of Charendon, 17 Ves. 499.

(f) Ibid. 498.

Interest upon Legacies.

WHERE any particular rate of Interest of a Legacy, and time of payment, is prescribed by a Testator, the Court, of course, follows his directions ; and, formerly, where a Legacy charged on personal Estate was given generally, with Interest, but not specifying what Interest, the Court allowed the full legal Interest (g) ; and if the Legacy was charged upon the *real Estate*, the rule was to give one-per-cent. less than the legal Interest (h). In some former cases also, the amount of the Interest given was made to depend upon the productiveness of the Fund (i), or the contrary ; but latterly the Court appears to have made no such distinctions, and whether the Legacy be charged on real or personal Estate (k), on Property productive or unproductive (l), four-per cent. only is given. Nor does a direction in the Will "to pay the Legacy as soon as possible," affect the rule (m).

In regard to Interest upon Legacies where none is directed by the Testator, a distinction will be discoverable between Legacies charged on real Estate—specific Legacies—and pecuniary Legacies.

*Where a Legacy is to be raised out of an *Estate devis.* [*79 ed for that purpose, and no day of payment is fixed, Interest at four-per-cent. will be given from the death of the Testator (n). If, however, a Legacy be given, charged upon a *dry reversion* (provided it appears to be a Reversion on the face of the Will) (o), the Legacy will carry Interest only from a year after the death of the Testator, a year being a convenient time for a sale (p).

Some *specific Legacies*, as of a Ring, &c. do not, from their nature, carry Interest (q), though they vest immediately upon the death of the Testator ; but specific Legacies of Stock will carry Interest from the Testator's death (r).

In regard to *Pecuniary Legacies*, where no Interest is given

(g) *Moore v. Moore*, 3 Atk. 402. *Beckford and Tobin*, 1 Ves. 311.

(A) *Ibid.* *Bryant v. Speke*, 1 Ves. 171. *Trimblestown v. Colt*, 1 Ves. 278.

(i) This seems hinted at in *Malcolm v. Martin*, 3 Bro. C. C. 54, and in *Bourk v. Ricketts*, 10 Ves. 333; and see *Raymond v. Broadbelt*, 5 Ves. 199.

(k) *Treves v. Townshend*, 1 Bro. C. C. 384. *Sitwell v. Bernard*, 6 Ves. 543.

(l) *Gibson v. Doll*, 7 Ves. 97. 1 Sch. & Lefr. 11. *Garthshore v. Chalie*, 10 Ves. 13.

(m) *Webster v. Hale*, 8 Ves. 415 ; and see 7 Ves. 96.

(n) *Spurway v. Glynn*, 9 Ves. 483. *Baynes v. Dixon*, 1 Ves. 42. *Maxwell v. Wattenhall*, 2 P. Wms. 25. *Shirt v. Westby*, 16 Ves. 393 ; and see *Pearson v. Pearson*, 1 Sch. & Lefr. 11.

(o) 1 Daniell, 84.

(p) *Maxwell v. Wattenhall*, 2 P. Wms. 26.

(q) See *Apreece v. Apreece*, 1 Ves. & Bea. 364.

(r) *Barrington v. Tristram*, 6 Ves. 345. *Kirby v. Potter*, 4 Ves. 175.

by the Will (unless in the case of an Infant having a right to demand maintenance from the Testator (s), of which more hereafter) it is only to be allowed at the rate of 4l. per cent. from the end of the year after the Testator's death (t). The remaining Interest goes to the residuary Legatee (u). In one 80*] case it is said, that where a *Legacy* is given *to a *Charity*, Interest shall be paid from the death of the Testator (x), but the Report is not warranted by the Registrar's Book (y).

The rule as to the payment of Interest on Legacies from the end of one year after the Testator's death, sometimes operates inequitably, but with a view to general convenience, it has been adopted (z); and applies equally to cases where the debts cannot be arranged for ten years, as where there are no Debts, and the Property is immediately tangible in the Funds (a).

But though it is generally true that (following the Rule in the Ecclesiastical Court) (b), an Executor is not bound to pay Debts or Legacies before the end of a year, because he cannot know until then what Fund there is to pay (c), yet this is only adopted for convenience; and if, in any case, it is quite clear that there are no Debts, the Court will distribute the Fund before the end of the twelve months (d).

Where the Court decrees a Legacy to be a satisfaction of a Debt, Interest is always given from the death of the Testator (e).

If a Legacy be brought into Court, and the Legatee has notice of it, so that it is his fault not to pray to have the Money, or that the Money should be put out, the Legatee in such case loses the Interest from the time the Money was brought into 81*] Court; but if *the Money was put out, the Legatee, is allowed the Interest which the Money yields (f).

Whether a *Tenant for Life* of a Legacy is entitled to Interest from the death of the Testator, or from a year afterwards, has been doubted (g); but from a recent Decision it appears, as to a *Tenant for Life* of a residue, that what is ascertained at the end of a year to be residue, is the Capital to the Interest of which the *Tenant for Life* is alone entitled (h).

(s) Tyrell v. Tyrell, 4 Ves. 5.

(t) Maxwell v. Wottenhall, 2 P. Wms. 25. Guillam v. Holland, 2 P. Wms. 343. Lloyd v. Williams, 2 Atk. 109. Pearson v. Pearson, 1 Sch. & Lefroy, 11. Birmingham v. Kirwan, 2 Sch. & Lefr. 455. Coleman v. Seymour, 1 Ves. 211. Beckford v. Tobin, 1 Ves. 310. Webster v. Hale, 8 Ves. 413.

(u) Pearson v. Pearson, 1 Sch. & Lefr. 12.

(x) 1 Atk. 356.

(y) See Mr. Sanders's note to the case in 1 Atk. 356.

(z) 6 Ves. 540.

(a) Gibson and Bott, 7 Ves. 59.

(b) 1 Sch. & Lefr. p. 11.

(c) See 1 Ves. 310.

(d) Garthshore v. Chalie, 10 Ves.

13.

(e) Clarke and Sewell, 3 Atk. 98.

(f) Maxwell v. Wittenhall, 2 P. Wms. 26.

(g) Fearne v. Young, 9 Ves. 552.

(h) Scott v. Hollingworth, 3 Madd. Rep. 161; and see Sitwell v. Barnard, 7 Ves. 520, and Gibson v. Bott, 7 Ves. 89.

If an *Annuity* be given by Will, the payment, it seems, commences from the death of the Testator, and Interest is due from that period (i), unless perhaps, where the Annuity is given out of the residue (k).

Wherever Legacies are given out of personal Estate, consisting of outstanding securities, those Legacies cannot be actually paid until the Money due upon such securities has been obtained; but by a Rule that has been adopted for the sake of general convenience, (though it sometimes bears hard on a *residuary* Legatee) (l), the Court holds the personal Estate to be reduced into possession *within a year* after the death of the Testator (m); and on this ground, Interest is payable upon such Legacies from that time, unless some other period is fixed by the Will (n). Actual payment may, in many instances, be impracticable *within that time; but in legal contemplation the right to [*82 payment exists, and carries with it the right to Interest until actual payment (o). In one Case the Fund did not become disposable for the payment of Legacies till near forty years after the death of the Testator, and yet the Legacies were held to bear Interest from a year after the Testator's death. Nor does a reference by the Testator to the time at which his personal Estate should be got in, without the most plain and distinct indication of his intention, affect the legal presumption, that the personal Estate may be got in within a year after the Testator's death (p).

If a Legacy is given in the currency of *Jamaica*, where the Testator resides, and there are Assets and Executors in both countries, the Legatees living in this country are not entitled to *Jamaica* Interest (q). Where *Jamaica* Interest is given, it is upon the particular circumstances of the case (r).

In cases upon *Indian* Wills; though sums are given in Rupees, if payment is to be made here, *Indian* Interest is not allowed (s).

A Legacy by a Testator residing in *Ireland*, to be paid in *England*, does not carry *Irish* Interest, but only four per cent. (t), the Interest of the Court.

(i) *Gibson v. Bott* 7 Ves. 96, 97.
Ferne v. Young, 9 Ves. 553.

(k) *Storer v. Prestage*, 3 Madd. Rep. 167.

(l) See what is said in *Sitwell v. Bernard*, 6 Ves. 539.

(m) See *Burke v. Ricketts*, 10 Ves. 334.

(n) See *ibid.* and *Sibley v. Perry* 7 Ves. 534, and *Webster v. Hale*, 8 Ves. 413.

(o) *Wood v. Penoyre*, 13 Ves. 333, 4.

(p) *Ibid* p. 334, and see *Entwistle v. Markland*, 6 Ves. 528, in note, and *Sitwell v. Barnard*, 6 Ves. 520.

(q) *Bourke v. Ricketts*, 10 Ves. 330. *Stapleton v. Conway*, 1 Ves. sen. 427. *Malcomb* against *Martin*, 3 Bro. C. C. 50.

(r) As in *Raymond v. Broadbelt*, 5 Ves. 199; and see the remark on that case, *Bourke v. Ricketts*, 10 Ves. 330.

(s) *Bourke v. Ricketts*, 10 Ves. 333.

(t) *Pierson v. Garnett*, 2 Bro. C. C. 38. The Report says *Irish* Interest was allowed, but that appears to be a mistake; See *Malcomb v. Martin*, 3 Bro. C. C. 53, and *Burke v. Bicketts*, 10 Ves. 334.

83*] *In general, a Legacy, whether vested or not, payable at a given time, carries Interest only from that time, unless the Testator has shown an intention to give Interest before the Legacy is payable (u) (1). There are, however, exceptions to this rule arising out of particular circumstances (x), such as *relationship*,—the *necessities of Legatees*,—or the *particular penning of the Will* (y).

Where there are Legacies to the Testator's *Children* the Court will direct Interest for their Portions immediately (z); for in regard to them, the rule seems to be, if a Legacy be given to a *legitimate Child*, (it is different if to a *natural Child*) (a), payable upon a contingency (b), or certainly, at a future day, and the Child has no other provision (c), (2) nor any maintenance allotted by the Will, giving the Legacy (d), it will carry Interest from the Testator's death, though Interest is not mentioned (e), on account of the imbecility of the Child (f), and the obligation 84*] attaching *upon the person who gives it, and because it is in the nature of a Portion (g). Such is the general rule; but in none of the Cases does it appear that the Son was adult, and had left his Father's family, and was established in business, circumstances, which might, perhaps, render the rule inapplicable.

But a contingent Legacy given to a *Grandchild* will not carry Interest (h), unless from the terms of the Bequest an intention

- (u) Heath v. Perry 3 Atk. 102.
- (x) Ibid. 101.
- (y) Ibid.
- (z) Glide v. Wright, Chan. Rep. 265. Incledon v. Northcote, 3 Atk. 438; and see Fonnerau v. Fonnerau, 3 Atk. 646.
- (a) Beckford and Tobin, 1 Ves. 300. Ellis v. Ellis, 1 Sch. & Lefr. 47; and see Perry and Whitehead, 6 Ves. 547; but see Hill v. Hill, 3 Ves. & Bea. 183; and what is said in Crickett v. Dolby, 3 Ves. 12.
- (b) It seems from Glyde v. Wright, 1 Ch. Rep. 265; Rennesev v. Parrot, 1 Ch. Ca. 249, and Leech v. Leech, ibid. that Interest was not formerly allowed on a contingent Legacy to a Child.
- (c) See Long v. Long, 3 Ves. 286,

- in note. Mitchell and Bower, 3 Ves. 287, 8.
- (d) 3 Atk. 716. S. C. 1 Ves. 293. See *vid.* Carry v. Askew, 1 Cox, 241.
- (e) Harvey v. Harvey, 2 P. Wms. 21. Green v. Belchier, Atk. 506. Heath v. Perry, 3 Atk. 102. Coleman v. Seymour, 1 Ves. 211. Chambers v. Goldwin, 11 Ves. 2. Carey v. Askew, 2 Bro. C. C. 58. Incledon v. Northcote, 3 Atk. 438. Ellis v. Ellis, 1 Sch. & Lefr. 5. Mole v. Mole, 1 Dick. 311.
- (f) Lowndes v. Lowndes, 15 Ves. 304.
- (g) Crickett v. Dolby, 3 Ves. 16.
- (h) Haughton v. Harrison, 2 Atk. 330. Butler v. Butler, 3 Atk. 69. Elton v. Elton, 3 Atk. 508. Pery v. Whitehead, 6 Ves. 546, 7. Errington v. Chapman, 12 Ves. 23.

(1) Vide *Lupton v. Lupton*, 2 Johns. Ch. Rep. 614. *Glen v. Fisher*, 6 Johns. Ch. Rep. 33.

(2) Vide *Lupton v. Lupton*, *ut supra*. But the exception to the general rule in favour of a child, as to the allowance of interest, does not extend to grand-children, *ut semel*. Ib.

to give Interest may be implied (i); and it has been held, that a Legacy bequeathed to a *Niece*, payable at a future day, does not carry Interest before the time of payment (k). Nor does a Legacy from a *Husband* to his *Wife*, payable at a future day, carry Interest (l), though *Lord Alvanley* seems to have confidently thought it would (m). In one Case, where the Legatee was a *Cousin* of the Testator, Interest was allowed from the Testator's death (n); but that Case does not appear to have been followed.

A *residue* payable at a future time (o), forms an exception to the general rule, that a Legacy payable at any given [*85 time whatever does not carry interest till that time, whether it be a vested Interest or not, unless something is said in the Will that shows the Testator's intention to give Interest in the mean time (p).

With respect to the *necessities* of Legatees inducing the Court to give Interest, it has been held, that if one, *not a Parent*, gives a Legacy to an *Infant* payable at twenty-one, without any Deviser over, and the Infant has nothing else to subsist on, the Court will direct part of this Legacy, in order to provide bread for the Infant, to be paid presently, allowing Interest for the same to the person paying it, out of the remaining Principal; but this is done very sparingly (q).

Accumulative Legacies.

THE doctrine as to *Accumulative Legacies* (professedly borrowed from the Civil Law) seems to be, that where the same *specific* thing is given *twice*, or where, in the *same Will*, a like sum or *quantity* is given (r), for the same cause, in the same act, and *totidem verbis*, or only with a small difference, a single, and not a double and accumulative Legacy passes; but in general, if *equal* (s) *greater* (t), or *less* (u) sums be given in one Will (x),

(i) *Taylor v. Johnson*, 2 P. Wms. 504, where Interest was given, and see what is said in *Ellis v. Ellis*, 1 Sch. & Lefr. p. 5, and the decision in *Hill v. Hill*, 3 Ves. & Bea. 183, where two of the Children were illegitimate. These cases seem to have proceeded upon an implication appearing on the Will that Interest should be given.

(k) *Crickett v. Dolby*, 3 Ves 10; and see *Palmer v. Mason*, 1 Atk 505.

(l) See *Stent v. Robinson*, 12 Ves. 461. S. C. MS. *Lowndes v. Lowndes*, 15 Ves. 301.

(m) *Crickett v. Dolby*, 3 Ves. 16; and see *Carey v. Askew*, 2 Bro. C. C. 59.

(n) *Pitt v. Fellows*, Mich. 8 Geo. 2 1733. MS.

(o) *Sisson v. Shaw*, 9 Ves. 282;

and see *Tyrell v. Tyrell*, 4 Ves. p. 5 *Nicholas v. Osborn*, 2 P. Wms. 421. and note 1, by Mr. Cox.

(p) *Heath v. Perry*, 3 Atk. 102.

(q) *Harvey v. Harvey*, 2 P. Wms. 23.

(r) *Duke of St. Albans v. Beauchamp*, 2 Atk. 636. Vid. *Holford v. Wood*, 4 Ves. 90. *Garth v. Meyrick*, 1 Bro. C. C. 30.

(s) As to equal Legacies, see *Hodges v. Peacock*, 3 Ves. 734. Dig. 22. T. 3. p. 12; but see *Benyon v. Benyon*, 17 Ves. 41. and the cases there noticed.

(t) At to the greater, see *Masters and Masters*, 1 P. Wms. 424. *Curry against Pile*, 2 Bro. C. C. 225.

(u) *Payne v. Payne*, Ch. Ca. 301; but see 2 Atk. 638.

(x) 2 Atk. 638.

86*] or by two *distinct Writings of different dates (x), as by a Will and a Codicil, or two Codicils, this is an augmentation, and the Legatee takes a double or accumulative Legacy (y); but though, *simpliciter* and *primâ facie*, two different instruments giving Legacies, whether of the same or of a larger amount, will be held accumulative, and not a substitution (z), yet the Rule does not hold if there appears upon the face of the Instrument an intention of the Testator to the contrary (a).

Probate being granted, as of a *Will* and *Codicil*, is conclusive as to the fact of their being *distinct* Instruments (b).

If the Legacy be expressed to be, or appears to be, given in each writing, *for the same cause* (c), it is considered as *repetition*, and not *addition* (d); but where one Legacy is given generally, and the other for an *express cause*, the Legatee, it has been held, takes both (e).

87*] If a Testator by Will gives 2000*l.* a year by way *of Jointure to any Woman he might marry, and after Marriage, by a Codicil, gives his Wife the same Jointure, she cannot claim both (f).

The Court presumes against double Portions (g), and small circumstances will raise an inference against them (h); but it seems doubtful whether Evidence from *Declarations of the Testator* is admissible to prove that the Legacy was not intended to be accumulative (i); and in all cases the *onus* of making out proof lies upon the Executor, and not upon the Legatees (k).

Substituted and added Legacies are, it seems, raiseable out of the same fund, and subject to the same conditions, as the Legacies substituted for, or added to (l).

(x) See *Allen v. Callow*, 3 Ves. 294.

(y) See *Masters v. Master*, 1 P. Wms. 423. *Foy v. Foy*, 1 Cox, 163, and *Hooley v. Hatton* 1 Bro. C. C. 390, in a note, and in particular Mr. Just. Aston's argument, which, says Lord Thurlow, in *Ridges against Morrison*, "contains the whole doctrine of the Law upon the subject." 1 Bro. C. C. 390, 1. In this latter case, the Reporter does not seem accurately to have expressed what Lord Thurlow says, in that part of his judgment where he expresses the rule as laid down by Mr. J. Aston; and see what is said by the Master of the Rolls in *Benyon v. Benyon*. 17 Ves. 42, and *Baillie v. Butterfield*, 1 Cox, 392.

(z) *Barclay v. Wainwright*, 3 Ves. 465.

(a) As it did in *Coote v. Boyd*, 2 Bro. 521, and in *Barclay v. Wain-*

wright, 3 Ves. 462; and see *Moggridge v. Thackwell*, 1 Ves. jun. 472. S. C. 3 Bro. C. C. 527. *Allen v. Callow*, 3 Ves. 289.

(b) *Baillie v. Butterfield*, 1 Cox, 392.

(c) See *Duke of St. Albans v. Beauclerk*, 2 Atk 640; and see *Campbell against Earl Radnor*, 1 Bro. C. C. 271.

(d) *Benyon v. Benyon*, 17 Ves. 43.

(e) *Ridges v. Morrison*, 1 Bro. 393.

(f) *Osborne v. the Duke of Leeds*, 5 Ves. 382.

(g) *Ibid.* 381.

(h) *Ibid.* 384.

(i) *Ibid.* 380.

(k) See *Roper on Legacies*, 2 vol. p. 499, and cases there cited.

(l) *Crowder v. Clowes* 2 Ves. Jun. 450.

Ademption of Legacies.

In regard to *Ademptions*, it has been laid down that an *alienation* by a Testator of the subject of a Legacy, if there is nothing else in the case, is an Ademption, and Equity will not set it up again (*m*).

Where Stock, in contemplation of a Marriage, was vested in Trustees for the separate use of the Wife for Life, and with full power to her to dispose of it by *Will*, and she made a Will during her Coverture, and survived her Husband, and afterwards took a transfer of the Stock into her own name, it was held *not [*88 to operate as a Revocation of the Will, or an Ademption of the Bequest of the Stock (*n*).

If a Leasehold Estate be bequeathed as a specific Legacy, such Bequest is deemed by a subsequent renewal (*o*); but where the Gift of a Lease is not specific, but passes under general words, such as "all and singular my Leasehold Estate, Goods, &c." a renewal has been held not to be an Ademption, it not being a specific Legacy, but an enumeration of the particulars of his Personal Estate (*p*).

It was the doctrine of *Lord King* (*q*), *Lord Talbot* (*r*), *Lord Hardwicke* (*s*), and others (*t*), that if a particular Debt, or part thereof, was bequeathed, and the same was recovered by the Testator in his life-time, in an *adverse* way, that would amount to an Ademption of the Legacy; but that if the Debt was *voluntarily* paid in, the Legacy, would not be adeemed, except where the Legacy of the Debt was to the Debtor (*u*). But the doctrine, that the *calling in* of a Debt operates as an Ademption, has not been approved, because the Testator might call in the Debt, fearing it might be lost, and not liking the security (*x*); and in a subsequent Case **Lord Hardwicke* qualified his [*89 general doctrine, by saying, that a *compulsory* payment may or may not adeem the Legacy, according to the circumstances with which it is accompanied (*y*), and that evidence may be adduced

(*m*) *Hambling v. Lister*, Ambl. 402.

(*n*) *Dingwell v. Askew*, 1 Cox. 427.

(*o*) *Hone v. Medcraft*, 1 Bro. C. C. 264; and see *Abney v. Meller*, 2 Atk. 593. *Coppin v. Fernyhough*, 2 Bro. C. C. 291. *Eyre v. Dolphin*, 2 Ball & Bea. 299. The decree in *Hone and Medcraft* is said not to be accurately stated. See 15 Ves. 394.

(*p*) *Suerling v. Lydiard*, 3 Atk. 199.

(*q*) *Rider and Wager*, 2 P. Wms. 330.

(*r*) *Partridge v. Partridge*, For. 228.

(*s*) *Lawson v. Stitch*, 1 Atk. 508.

(*t*) *Crocket v. Crocket*, 2 P. Wms. 165. Ambl. 402.

(*u*) *Rider and Wager*, 2 P. Wms. 331.

(*x*) *Earl of Thomond v. Earl of Suffolk*, 1 P. Wms. 464; and see *Ford v. Fleming*, 2 P. Wms. 469. *Poulet's case*, Raym. 335. *Swinb.* 648 6th. edit.

(*y*) See *Hambling v. Lister*, Ambl. 401; and see *Fryer v. Morrice*, 9 Ves. 360, a case of that kind.

to show *quo animo*, the Debt was called in (z). The Master of the Rolls (*Sir Thomas Clarke*) observes, "a Debt given specifically, and called in, and no account appears why it was called in, is an Ademption. It is the intent that governs. It was so in the *Roman Law* (a). I do not go so far as *Lord Talbot* did in *Ashton v. Ashton*, and say, that the calling in a Debt by the Testator is not an Ademption, because it *might* be from an apprehension of such Debt being in danger; but if there is proof that it was called in for any other reason than from an intention to adeem, I think it is not an Ademption (b)."

The distinction, however, between a *compulsory* and a *voluntary*, payment, appears to have been since exploded; and the Rule now seems to be, that a Bequest of a Debt is adeemed by the Debt being paid to the Testator in his life-time, whether the payment be *compulsory* or *voluntary*, and whether the sum be expressed in the Bequest, or the Debt is Bequeathed generally (c); for the principal of Ademption by receiving the thing given, is, that the thing given no longer exists; for if after 90*] the receipt of it *it could be demanded, that would be converting it into a pecuniary, instead of a specific, Legacy (d). (1).

In a case where the Testator had received dividends under a Bankruptcy, upon a Debt previously bequeathed, this, it has been held, did not adeem the Legacy (e).

If the intention appears to be to give a pecuniary Legacy, secured on certain Funds, such as *Mortgages, Bonds, or Notes*,

(z) *Drinkwater v. Falconer*, 1 Ves. 624. the Rolls, in *Wood v. Penoyr*, 13 Ves. 336.

(a) Inst. 2, 12, 20. is full in point.

(c) *Stanley v. Potter*, 2 Cox, 180.

(b) *Hambling v. Lister*, Amb. 402: and more fully stated from a Reg. book by Sir Wm. Grant, Master of

(d) *Fryer v. Morris*, 9 Ves. 363.

(e) *Ashburner v. Macguire*, 2 Bro. C. C. 108.

(1) Where a debt or specific chattel is bequeathed, the legacy is adeemed or extinguished, by the payment of the debt, or the sale or conversion of the chattel, in the lifetime of the testator. *Walton v. Walton*, 7 Johns. Ch. Rep. 258. But a general pecuniary legacy, though payable out of a particular fund, is not adeemed by the extinguishment of the fund. Ib. Nor is the legacy extinguished, by a variation of the testator's interest in the specific thing bequeathed, by operation of law. As, where the testator bequeathed 30 shares in the bank of the *United States*, and before his death, the charter of the bank expired, and all the funds and property of the corporation were conveyed to trustees, who divided the funds received by them, from time to time, among the stockholders, and the testator received the dividends on the shares bequeathed, but did not sell or dispose of them; it was held, that this was an adeemption of the legacy only *pro tanto*; and that the legatee was entitled to the dividends after the testator's death. Ib. So, where two shares in the *Western Inland Lock Navigation Company* were bequeathed, and in the lifetime of the testator, by a certain arrangement, the shares were increased to six, and the stock of the company, in virtue of a legislative act, became vested in the state, and a certain sum was to be paid to the stockholders, as an indemnity; it was held, that the legacy was not extinguished. Ib.

and the securities are afterwards discharged, *voluntarily or compulsorily*, the Legacy according to several Cases, is not adeemed (f). So, if a Legacy be given to J. S. to be paid out of such a particular Debt, and the Debt is paid in (g), or there is no such Debt, or the Fund fails, still the Legacy, it has been held, must be paid, and the failing of the *modus* appointed for payment will not defeat the Legacy (h).

If there be a Legacy of Stock, and after the Will the Testator sells the Stock, it has been questioned whether that amounts to an Ademption (i). It seems it would (k); and if he were to sell *part* of it, it would be considered as an Ademption *pro tanto* (l); but if the Testator gives part of his Stock, and sells out, and before his death purchases other Stock, this will * not be an Ademption (m), unless there be another disposition of the Property (n).

Where a Legacy is of the "*value*" of Securities, &c. there, though the Securities be changed, the Legacy is not adeemed (o).

Where a Testator gives a Legacy for one particular purpose only, and after that applies a sum of Money to the same purpose, the Legacy is adeemed (p); but where a Devise was of 400*l.* to be laid out in finishing a House, and the Testator lived to lay out as much himself, but left the House unfinished, the 400*l.* was, nevertheless, ordered to be paid, and the Legacy not considered as adeemed (q).

If there be a Bequest of Goods, &c. specified to be in a *particular place*, as in the Testator's House at B., they must be there at his death, in order to give effect to the Legacy (r); for if they are removed before that period, unless from accident (s), or the Testator was in the habit of removing them from one House to another (t), it will be presumed the Testator had altered his intention, and meant to adeem the Bequest (u).

(f) Crokat v. Crokat, 2 p. Wms. 164. See Attorney-General v. Parkyn, Ambl. 566; but see Ashburner v. Macguire, 2 Bro. C. C. 108.

(g) See 2 P. Wms. 329, 330.

(h) Saville v. Blacket, 1 P. Wms. 779.

(i) Avelyn v. Ward, 1 Ves. 426; and see Simmons v. Vallance, 4 Bro. C. C. 38.

(k) See Brownedon against Winter, Ambl. 57; Partridge v. Partridge, For. 227.

(l) Jeffreys v. Seffreys, 3 Atk. 120; and see Partridge v. Partridge, For. 227.

(m) Humphreys v. Humphreys, 2 Cox, 184.

(n) Partridge v. Partridge, For. 226. Avelyn and Ward 1 Ves. 426.

(o) Partridge v. Partridge, For. 226.

(p) Avelyn and Ward 1 Ves. 426.

(q) See Roome v. Roome 3 Atk. 183.

(r) See Roome v. Roome 3 Atk. 183.

(s) See Roome v. Roome 3 Atk. 183.

(t) See Roome v. Roome 3 Atk. 183.

(u) See Roome v. Roome 3 Atk. 183.

It is a rule, and long recognized (x), that where a *Parent*, or a 92*] *Person in loco parentis* (y), (for it is *otherwise in the case of a *Stranger* (z), or collateral Relation (a), and a *Father* is considered as a *Stranger* to his *natural Child*) (b), gives a *Legacy* as a *Portion*, and afterwards upon *Marriage*, or any other occasion calling for it, advances *presently* and not *contingently* (c), in the nature of a *Portion* to that *Child* (for there must be a resemblance between the two provisions—*ejusdem generis*) (d), such advance, though *less* than the amount of the *Legacy* (e), and *a fortiori*, if *more* (f), or *equal* (g), will amount to an *ademption* of the *Gift* by the *Will*, and a *Court of Equity* will presume he meant to satisfy the one by the other (h). In such cases slight circumstances of difference are not regarded (i), as they are in respect to the performance and satisfaction of a *Covenant* (m). But evidence is admissible to *repel the presumption* (n); and if in the case of a *Portion* given by a *Parent*, there be any thing to show that the *Portion* was paid without an intention to *adeem*, the mere payment will not amount to an 93*] *Ademption* (o). *Parol declarations* of a *Testator*, *whether *previous* or *subsequent* to the *Gift*, are admitted (p); and any demonstration from the conduct and language of the author of both *Gifts* is admissible to show that he considered the *Gift* by the *Will* as still a subsisting benefit (q). On the other hand, evidence may be adduced to show that an *Ademption* was intended (r). If the evidence be conflicting, and such as leaves the intention doubtful, the legal presumption will prevail (s). It is observable, that the presumption in these cases, though it

(x) See *Irod and Hurst*, 2 *Freem.* 224.

(y) *Shadall v. Jekyll*, 2 *Atk.* 516. *Grave against Lord Salisbury* 1 *Bro. C.* 426, 7. *Monk v. Lord Monk*, 1 *Ball & Bea.* 298.

(z) See *Hartop v. Whitmore*, 1 *P. Wms.* 681. *S. C. Prec. Ch.* 541. *Powell and Cleaver*, 2 *Bro. C. C.* 499; but see the case put, 2 *Atk.* 518.

(a) *Shudal v. Jekyll*, 2 *Atk.* 516; and see *Brown v. Peck*, *Eden's Rep.* p. 149, where a *Devise and Legacy* by an *Uncle* was held not to be *adeemed* by an advancement upon her *Marriage*.

(b) *Ex parte Pye*, 18 *Ves.* 147, 518.

(c) *Spinks v. Robins*, 2 *Atk.* 491.

(d) *Powell v. Cleaver*, 2 *Bro. C. C.* 517, 8.

(e) *Hartop v. Whitmore*, 2 *P. Wms.* 681. *Rosewell v. Bennett*, 3 *Atk.* 77.

(f) 2 *Vern.* 484.

(g) *Briggleson v. Grub*, 2 *Atk.* 48.

(h) *Trimmer v. Bayne*, 7 *Ves.* 515. *S. P.* 3 *Bro. C. C.* 61.

(i) As to the satisfaction of *Covenants*, see *Trimmer v. Bayne*, 7 *Ves.* 515.

(m) *Hartopp v. Hartopp*, 17 *Ves.* 191.

(n) *Ellison and Cookson*, 2 *Bro. C. C.* 309. *S. C.* 3 *Bro. C. C.* 61, and 1 *Ves. jun.* 100. *Blinckhorn v. Feast*, 2 *Ves. sen.* 27. 2 *Atk.* 492, 518.

(o) *Debeze v. Mann*, 2 *Bro. C. C.* 165, 519. *S. C.* 1 *Cox*, 346.

(p) *Vid Trimmer v. Bayne*, 7 *Ves.* 518; but see *Mascal v. Mascal*, 1 *Ves.* 324, where *Lord Hardwicke* says no regard is to be paid to declarations not at the time of making the will.

(q) *Ellison v. Cookson*, 1 *Ves. jun.* 108.

(r) *Rosewell v. Bennet*, 3 *Atk.* 78. *Monk v. Lord Monk*, 1 *Ball & Bea.* 305.

(s) *Dwyer v. Lyssaght*, 2 *Ball & Bea.* 156.

may be rebutted by evidence, is considered as a *presumption of Law*, and is therefore never sent for the consideration of a Jury (i). Whether evidence ought to have been admitted originally has been doubted. *Lord Kenyon* appears to have sanctioned it in *Ellison v. Cookson*, but *Lord Thurlow*, when the case came before him, seems to have disapproved of it (u), and *Lord Eldon* observed, "I say nothing of the nature of any of these Rules" (x).

In the case of a Portion given by a *Stranger*, evidence may be adduced to show that such *Stranger* considered himself as standing in *locu parentis* (y).

Where the Bequest in the Will is of a *Residue*, an advancement, it seems, does not operate as an *Ademption** (a). [*94 The thing given also, to be an *Ademption*, must be *ejusdem generis* with the *Legacy*: where, therefore, a Father gave 500*l.* to his Son by Will, and afterwards took him into Partnership, the Stock, amounting to 3,000*l.*, was held not to be a satisfaction of the *Legacy* (b).

Of residuary Bequests ; and where the Executor is entitled to the Residue.

A *RESIDUARY* Bequest of *personal Estate* (it is otherwise as to *real*) (c), carries not only every thing not disposed of, but every thing that is ill disposed of (d), and every thing that in the event turns out not to be disposed of (e), whether by a partial revocation of the Will (f), a lapse (g), or by a Gift being void (h), or not sufficiently disposed of (i), or given on a Contingency which does not happen (k), or otherwise. The limitations of a particular Estate, and those of the residue, may be quite incongruous, for the Testator supposes that each is to have its separate effect ; but what *eventually turns out to be indisposed of [*95

(t) *Ellison v. Cookson*, 3 Bro. C. C. 63. *Trimmer v. Bayne*, 7 Ves. 515.

(u) See 1 Ves. jun. 109, 110.

(x) See *Trimmer v. Bayne*, 7 Ves. 515.

(y) *Ex parte Pye*, 18 Ves. 153, 4.

(a) *Farnham v. Phillips*, 2 Atk. 215. *Watson v. Earl of Lincoln*, Amb. 325. *Smith v. Strong*, 4 Bro. C. C. 493. *Freeman v. Banks*, 5 Ves. 79 ; but see *Reckman v. Morgan*, 1 Bro. C. C. 63, and 2 Bro. C. C. 394, and *Bengoing v. Walker*, 15 Ves. 513.

(b) *Holmes v. Holmes*, 1 Bro. C. C. 555 ; and see *Grave v. Earl of Salisbury*, 1 Bro. C. C. 425.

(c) *Amb. 530. Durour v. Motteux*, 1 Ves. 322.

(d) *Leake v. Robinson*, 2 Meriv. 393.

(e) *Cambridge v. Rous*, 8 Ves. 25 ; and see *Green v. Ekins*, 2 Atk. 475. *Windham v. Windham*, 3 Bro. C. C. 58. *Shaw against Cuncliffe*, 4 Bro. C. C. 152. *Leake v. Robinson*, 2 Meriv. 392, 3.

(f) See *Humphrey v. Tayleur*, Amb. 138.

(g) *Cambridge v. Rous*, 8 Ves. 25. *Wright v. Hall*, Fort. 182. *contra Sprigg v. Sprigg*, 2 Vern. 394.

(h) *Durour v. Motteux*, 1 Ves. 320. *Shanley v. Baker*, 4 Ves. 732. *Browne v. Higgs*, Ibid. 708. S. C. on re-hearing, 5 Ves. S. C. and confirmed on appeal to the Lord Chancellor, 8 Ves. 561.

(i) *Browne v. Higgs*, 4 Ves. 708.

(k) *Bird v. Lefevre*, 15 Ves. 509.

will not the less constitute residue, because some of the provisions contained in the residuary clause may be inapplicable to a case of which the Testator did not foresee the existence (*l*). Where there is a lapsed Devise of *real Estate* the *Heir at Law* takes, subject, however, to the distinctions made where a real Estate is devised to be *sold out and out*, as the expression is, of which more hereafter; but in the case of *personal Property*, the *residuary Legatee* is preferred either to the next of Kin, or the Executor (*n*), except where some part of the residue itself is ill given (*o*), or the Testator bequeaths the residue, exclusive of a part separated from the residue, but not effectually disposed of, in which cases the residuary Legatee will not take the whole (*p*). If the residue itself, or part of it, is not well disposed of, such residue, or part of it, goes to the Testator's next of Kin (*q*), and in such case the Testator's Widow is entitled to a share (*r*). The words in a residuary Bequest, "not hereinbefore specifically disposed of," have been held to mean only, "not particularly disposed of;" and not to exclude the residuary Legatee from a lapsed specific Legacy (*s*).

A Devise of a residue of personal Estate to three is a joint Devise, and survives (*t*). So, if *A.* makes *two Executors, *B.* and *C.* and appoints them residuary Legatees, and *B.* dies, the whole survives to *C.* (*u*)

If a Legacy be given to two, and one dies before any severance of the Jointenancy, the Legacy survives (*x*); but if a Legacy be given to several as Tenants in common, as, if a residue be given to six Persons, *to each of them a sixth part*, and one dies in the Testator's Life-time, it will be a lapsed Legacy, as to *one sixth* (*y*).

A simple Bequest of a Legacy, or a Residue of personal Property to *A. and B.* without more, is a *Jointenancy*, whether they are Executors or not; and it is upon the other side to show from some part of the context of the Will, applying to that Bequest, that the words are not to have their legal operation (*z*). The Court inclines as much as possible to construe words as making a *Tenancy in common* (*a*); and the words "*to and amongst*,"

(*l*) *Leake v. Robinson*, 2 Meriv. 393.

(*n*) *Cambridge v. Rous*, 8 Ves. 25.

(*o*) *Leake v. Robinson*, 2 Meriv. 335.

(*p*) *Davers v. Dewes*, 3 P. Wms. 40. *Attorney-General v. Johnstone*, Ambli. 577. *Baker v. Hall*, 12 Ves. 497.

(*q*) *Leake v. Robinson*, 2 Meriv. 394.

(*r*) *Ib.* and *Pickering v. Lord Stamford*, 2 Ves. jun. 272, 581. 3 Ves. 332, 492, and S. C. 4 Bro. C. C. 214.

(*s*) *Roberts v. Cook*, 16 Ves. 451.

(*t*) *Webster v. Webster*, 2 P. Wms. 347; and see *Lady Shore v. Billingsley*, 1 Vern. 482. *Thomas Jones's Rep.* 162.

(*u*) *Cray v. Willis*, 2 P. Wms. 529.

(*x*) *Page v. Page*, 2 P. Wms. 489.

Cray v. Willis, 2 P. Wms. 529.—

Shore v. Billingsley, 1 Vern. 482.

Cox v. Quantock, 1 Ch. Cas. 236.

2 Chan. Cas. 64.

(*y*) *Page v. Page*, 2 P. Wms. 484.

S. C. Mos. 42. 2 Str. 870.

(*z*) *Crooke v. De Vandes*, 9 Ves.

204. *Campbell v. Campbell*, 4 Bro. C. C. 15.

or "amongst (b)," or "between (c)," or "respectively (d)," are held to make a *Tenancy in common*. And wherever there are words plainly importing a *Tenancy in common*, such construction will be put upon other inconsistent words, that will, if possible, not defeat and *destroy the effect of the other [*97 words importing a *Tenancy in common* (e).

The Cases are very numerous on questions relating to the right of an *Executor to the Residue*; and Lord Hardwicke thought it impossible to reconcile them, their contrariety being so great (f). Distinctions, indeed, have been heaped on distinctions (g), and Case upon Case, until it is not easy to say upon what foundation the doctrine stands (h). Lord King lamented the uncertainty of the Law on this subject (i), and brought in a Bill to settle all doubts, which did not fail on any particular reason, but unfortunately there was then a difference between the two Houses, and it was thrown out by way of reprisal (k).

By the *Common Law*, the appointment of an *Executor* vests in him all the personal Estate of the Testator, as *Hæres Testamentarius*, to use the expression of the Civil Law, or in other words, "as Heir of the personal Estate (l)," or, as Sir John Strange terms it, "as legal residuary Legatee (m);" and if any part, after payment of the Debts, Funeral Expenses and Legacies, is undisposed of by the Will, it remains with the Executor for his own benefit. The appointment of more than one Executor, unless *they are expressly made *Tenants in com-* [*98 *mon* of the Residue (n), gives them a joint interest in the Residue (o), which if not severed (as it may be by slight acts indicative of an Intention to sever) (p), will survive (q).

(a) Campbell v. Campbell, 4 Bro. C. C. 17.

(b) Ibid.

(c) Laahbrook v. Cock, 2 Meriv. 70, a case of real Estate; but the same words, I apprehend, would have the same construction if it were personal Estate.

(d) Heath v. Heath, 2 Atk. 121.

(e) Russell v. Long, 4 Ves. 554. See Lord Bindon v. Earl of Suffolk, 1 P. Wms. 96. Stinger v. Phillips, 1 Eq. Ca. Abr. 292, 3, and the words of the decree, 1 P. Wms. 97. n. 1. See what is said of Suffolk and Bindon, 1 Pull. & Bos. N. S. p. 90.

(f) 2 Atk. 45.

(g) Hornsby and Finch, 4 Bro. C. C. 251.

(h) See King v. Dennison, 1 Ves. & Bea. 273.

(i) 2 P. Wms. 340.

(k) Wilson v. Ivat, 2 Ves. 166.

(l) Clennell v. Lewthwaite, 2 Ves. jun. 648.

(m) Wilson v. Ivat, 2 Ves. 166.

(n) As in Pitt v. Benyon, 1 Bro. C. C. 589.

(o) Frewen v. Relfe, 2 Bro. C. C. 220.

(p) See Crooke and De Vandes, 11 Ves. 333. Jackson v. Jackson, 9 Ves. 591; and see on this subject Baldwin against Johnson, 3 Bro. C. C. 455. S. C. mentioned 2 Wood Lect. 132, in note.

(q) In Draper's case, 2 Cha. Cas. 64, the Lord Chancellor expressed his dislike of the Doctrine that executors should take as Joint-tenants; but said, "it must be so, since the Judges will have it so." See Webster and Webster, 2 P. Wms. 347. Griffiths v. Hamilton, 12 Ves. 298, and 9 Ves. 598. Baldwyn v. Johnson, 3 Bro. C. C. 454. White v. Williams, 3 Ves. & Bea. 75. S. C. Coop. 58.

The Common-Law right of the Executor is, however, in some degree, controlled by decisions in Equity; and wherever, from the language of the Will, there is *reasonable ground* (r) for supposing that the Testator did not intend the Executor should take the Surplus, he will be considered as a Trustee for those on whom the Law would cast the Surplus in case of an Intestacy (s). If there be any *next of kin*, they will take the Property; but if none, the Crown takes it (t). In some of the Cases it has been said there must appear on the face of the Will, "*a strong and violent presumption* (u)," *a necessary implication* (x); in other cases, "*an irresistible inference* (y)," to disappoint the claim 99*] of the Executor; *but some of those expressions have been considered as going too far (z); a strong and violent presumption is all that seems required (a). What expressions in a Will are considered as indicating that the Executor was meant to be a Trustee, has been matter of controversy in a great variety of Cases.

If Executors are expressly termed in the Will *Executors in Trust* (b), or if one of the Executors takes as a *Trustee* (c), or if Executors have a Legacy "*for their care* (d)," these or other expressions of the kind, are considered as denoting that only the office of Executor was intended, and preclude them from taking any beneficial interest. So, where the Testator bequeaths his Property to his *Executors in Trust*, but does not declare the Trust, the Executor is excluded (e); and if a Trust of Personal Property given to Executors be expressed, but not sufficiently, 100*] *or if a Trust be declared that cannot be executed, the

(r) *Dickes v. Lambert*, 4 Ves. 729.

(s) *Androvin v. Poiblane*, 3 Atk. 299.

(t) *Liddleton v. Spicer*, 1 Bro. C. C. 201; and see *Barclay v. Russell*, 3 Ves. 430, and 1 Black. Rep. 123.

(u) *Newstead v. Johnson*, 2 Atk. 45. See *Clennell v. Lewthwaite*, 2 Ves. jun. 471. *Pratt v. Sladden*, 14 Ves. p. 193.

(x) *Bish. of Cloyne v. Young*, 2 Ves. 96.

(y) *Bowkerv. Hunter*, 1 Bro. C. C. 330.

(z) See *Clennell v. Lewthwaite*, 2 Ves. Jun. 471. *Pratt v. Sladden*, 14 Ves. 193.

(a) 2 Ves. Jun. 571.

(b) *Bagwell v. Dry*, 1 P. Wms 700. *Read v. Snell*, 2 Atk. 645. *Pratt v. Sladden*, 14 Ves. 198.

(c) *White v. Evans*, 4 Ves. 21. *Griffiths and Hamilton*, 12 Ves. 308. *Milnes v. Slater*, 8 Ves. 308. *Sadler v. Turner*, 8 Ves. 624.

(d) *White v. Evans* 4 Ves. 21.

Rachfield v. Careless, 2 P. Wms. 158. S. C. 9 Mod. 9. *Cordell v. Noden*, 2 Vern. 148. S. C. Prec. Ch. 12. *Newstead v. Johnson*, 2 Atk. 46; and see *Bishop of Cloyne v. Young*, 2 Ves. 97. *Gibbs v. Ramsey*, 2 Ves. & Bea. 297. It is observable, that in the case referred to, of *Cordell v. Noden*, the Testator gave several Legacies to his Relations, amounting to near the value of his Estate, and made B. and C. Executors, and gave them 20l. and entreated them to take the trouble of getting in his Estate. The Testator lived ten years after, and acquired an additional Estate; and it was decreed, the surviving Executor was a Trustee, and that the Surplus should be distributed, not according to the Statute of Distributions, but according to the proportion of each one's Legacy, bequeathed to him by the Testator.

(e) *Paice v. Archbishop of Canterbury*, 14 Ves. 370; and see *Morris v. Bishop of Durham*, 10 Ves. 527.

next of kin will take (*f*); for in these cases the Executors appear not intended to take any beneficial Interest. There is a distinction between an express Trust for an indefinite purpose (*g*), and those cases where, from the indefinite nature of the purpose, the Court concludes that a proper Trust could not be intended; though words may have been used which, had the objects been definite, would by construction import a Trust (*h*). In the first description of cases the Devisee does not take beneficially (*i*), in the latter he does (*k*).

A Bequest, therefore, for such purposes as Executors shall in their discretion think proper, gives them the property beneficially (*l*).

There are cases where, though the Executor is named a Trustee for *specific particular purposes* mentioned in the Will, affecting only *part* of the Property, he will still be allowed to take the residue; he not being considered in such cases as a Trustee with regard to the *whole* of the Property which he takes as Executor (*m*).

Where there was a *residuary clause* in a Will, but the name of the residuary Legatee was not inserted, the Executor was not allowed to take (*n*); *so where the residuary clause [*101 begun but not finished, the Executor was excluded (*p*), as he was also in the case where there was a *residuary Bequest*, and the Legatee died in the Life-time of the Testator (*q*). But merely leaving a space after finishing a Bequest is not sufficient to make the Executor a Trustee (*r*). In another case, where the Testator made whoever should be the American Ambassador his Executor, this was considered as showing that it was not an appointment from personal regard, and therefore the residue did not pass (*s*). It would be the same, it seems, if a *Partnership* were made Executors (*t*). So where the Testatrix directed her Executors should be *paid for Journies and Expenses*, this was considered as evidencing an Intention that they should be Executors in *Trust* only (*u*).

(*f*) See dict. *Morris v. Bishop of Durham*, 10 Ves. 527, 533, 537.

(*g*) 9 Ves. 399. 10 Ves. 522, 537.

(*h*) *Gibbs v. Rumsey*, 2 Ves. & Bea. 298.

(*i*) *Ibid.* 297.

(*k*) *Ibid.* 294, &c.

(*l*) *Paice v. Archbishop of Canterbury*, 14 Ves. 370; and see *Morris v. Bishop of Durham*, 10 Ves. 527, 533, 537.

(*m*) *Vid.* *Pratt v. Sladden*, 14 Ves. 198. *Dawson v. Clarke*, 15 Ves. 408; and see *Southcote v. Watson*, 3 Atk. 232.

(*n*) *Vid.* *Mordeaunt and Hussey*, 4 Ves. 117. *Bishop Cloyne and Young*, 2 Ves. 91. *Lord North v. Purdon*, 2 Ves. 495. *Hornsby v. Finch*, 1 Ves.

jun. 334, and S. C. 2 Ves. jun. 78; and see *Langham v. Sanford*, 17 Ves.

435. S. C. on appeal, 2 Meriv. 6; and also *Lord North v. Purdon*, 2 Ves. 495, a similar case.

(*p*) *Knwell v. Gardiner*, Gilb. Eq. Rep. 184.

(*q*) *Bennet v. Batchellor*, 1 Ves. jun. 63. S. C. 3 Bro. C. C. 28.

(*r*) *White v. Williams*, Coop. 58. S. C. 3 Ves. & Bea. 72.

(*s*) *Urquhart v. King*, 7 Ves. 225, approved in *Griffith v. Hamilton*, 12 Ves. 309, and *vid.* *Lord North v. Purdon*, 2 Ves. 495.

(*t*) *De Mazar v. Pybus*, 4 Ves. 648.

(*u*) *Dean against Dalton*, 2 Bro. C. C. 634.

A *pecuniary Legacy* to a sole Executor, however small, (except, perhaps, it be of mourning only,) (*x*), excludes him from 102*] the residue (*y*), unless under *special circumstances (*z*), as, where the Legacy is so qualified that it is not inconsistent with his taking the Legacy (*a*). The rule has been supposed to have been originally adopted to prevent Fraud (*b*); but, more probably, on the ground that it could not be intended that a person having a *part* given to him was to take the *whole* (*c*). *Lord Hardwicke* does not seem to have approved of this reason in one Case (*d*), though he does in others (*e*).

In *Hatton v. Hatton* (*f*) *Lord King* observed, "the construction of an Executor who had a Legacy, being a Trustee for the residue of the personal Estate, was first made in a Case where an old Woman had been drawn in to make a Will by one who was not related to her, and to make him Executor of the same; and as she had given him a Legacy in the Will, it was collected she did not intend him the residue, and since that time this doctrine has prevailed. But he thought, according to common sense, the Executor standing *loco Testatoris*, should have the whole of the personal Estate which the Testator had not wholly disposed of; but this point," he said, "has been settled otherwise, and he would not alter it."

103*] *If a Legacy be given to *A.* by Will, and *A.* by a *Codicil* is appointed Executor, it may be doubted whether such Executor would not be entitled to the surplus (*g*). *Equal* pecuniary Legacies to two or more Executors, (all the Executors named in the Will) excludes them from the Surplus (*h*); nor does it seem important whether such Legacies are given by the Will creating the residue, or by a subsequent Instrument (*i*). And the giving a Legacy directly to the Executor, or in Trust for him, is the same, and equally excludes him from the residue; and if the residue be given to him *for life* he is excluded

(*x*) *Wilson v. Ivat*, 2 Ves. 166. *Buford v. Bradford*, 2 Atk. 222; but see what is said in *Southouse v. Bate*, 2 Ves. & Bea. 399.

(*y*) *Foster v. Munt*, 1 Vern. 473. This is the leading cause on that point. *Petit v. Smith* 1 P. Wms. 7. *Matthews v. Courthope*, 3 Salk. 82.

(*z*) *Bish. of Cloyne v. Young* 2 Ves. 97. *Dicks v. Lambert*, 4 Ves. 729; and see *Lawson v. Lawson*, 7 Bro. P. C. 511.

(*a*) *Nourse v. Finch*, 4 Bro. C. C. p. 251.

(*b*) *Kennedy v. Stainsby*, 1 Ves. jun. 66, in note.

(*c*) *Duke of Rutland v. Duchess of Rutland*, 2 P. Wms. 213. *King v. Denison*, 1 Ves. & Bea. 277.

(*d*) *Bishop of Cloyne v. Young*, 2 Ves. 97.

(*e*) *Newstead v. Johnson*, 2 Atk. 46. *Southcote v. Watson*, 3 Atk. 229. *Androvin and Poilblanc*, 3 Atk. 300. *Blinkhorn v. Feast*, 2 Ves. 29.

(*f*) *M. S. Trin.* 6 Geo. 2. 1732. S. C. 2 Eq. Abr. 444; see also what is said by Lord Chancellor Macclesfield in *Farrington v. Knightly*, 10 Mod. 443.

(*g*) See dict. *Langham v. Sanford*, 2 Meriv. 21, 2.

(*h*) *Foster v. Munt*, 1 Vern. 473. *Petit v. Smith* 1 P. Wms. 6. *May v. Lewin*, mentioned 2 P. Wms. 162. *Nisbet v. Murray*, 5 Ves. 158. *Muckleston v. Browne*, 6 Ves. 64. *Carey v. Goodinge*, 3 Bro. C. C. 110.

(*i*) *Muckleston v. Browne*, 6 Ves. 64.

(k). It is settled, that *Legacies* to the next of kin do not vary the Rule (l), though *Lord King* appears to have determined otherwise (m). If, indeed, a clause were inserted in the Will declaring an intention to give nothing by the Will to the next of kin, such a clause, it seems, would rebut their Equity (n).

If the Legacy given to the Executor is consistent with the intent that the Executor should take the *whole, it will not [*104 exclude him (o). If, therefore, a Legacy, whether pecuniary or specific, be given to an Executor for *Life*, that does not exclude him, the meaning being supposed to be, to take that particular Legacy out of the residue, for the sake of giving him a limited Interest (p). So where a Legacy is given for *Life* or for years, and the residuary Interest in the Legatory Property over to another, the Court has said, that is not sufficient to exclude the Executor from the Surplus; because that might be for the sake of taking out the Interest given over (q). So where the Legacy to the Executor is only an *exception* out of another Legacy, it will not exclude him from the residue (r). In like manner, a Legacy to one only of two or more Executors (s), or to two of six Executors (t) does not exclude the Executors from the Surplus; because a preference, *pro tanto*, may have been designed. The same Rule holds where *several* Executors have *unequal* pecuniary Legacies (u), and where unequal Legacies are given to some of the Executors, and no Legacies to others (x).

*A Legacy to two Executors of 20*l.* each out of the Real [*105 Estate, as a compensation for their trouble, would not, it seems, constitute the Executors Trustees for the next of kin of the Personalty, because it may be inferred that the Gift was in-

(k) *Newstead v. Johnston*, 2 Atk. 46.

(l) *Bishop of Cloyne v. Young*, 1 Ves. 91. *Bayley v. Powell*, 2 Vern. 361. S. C. Prec. Ch. 92. *Seley v. Wood*, 10 Ves. 71, and *Griffiths v. Hamilton*, 12 Ves. 310. *Andrew and Clarke*, 2 Ves. 162. *Langham v. Sanford*, 17 Ves. 451. *Duke v. Duchess of Rutland*, 2 P. Wms. 212. Mos. 4. *Davers v. Dewes*, 2 P. Wms. 43. *Tomkins v. Tomkins* 17 Geo. 1743. MS.

(m) *Attorney General v. Hooker*, 2 P. Wms. 338. *Harper v. Lee*, Mos. 4.

(n) *Ambl.* 137.

(o) *Bowker v. Hunter*, 1 Bro. C. C. 332; and see *Hornsby v. Finch*, 2 Ves. jun. 80. *Lawson v. Lawson*, 7 Bro. P. C. 511.

(p) *Blinkhorn v. Feast*, 2 Ves. 29.

(q) *Ibid.*

(r) *Dicks v. Lambert*, 4 Ves. 731. *Griffiths v. Rogers*, Prec. Ch. 231,

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cited 3 Atk. 229. *Lady Granville v. Duchess of Beaufort*, 1 P. Wms. 114. S. C. Vin. Abr. 2 Vern. 648. 1 Bro. P. C. 305. *Blinkhorn and Feast*, 2 Ves. 39. *Newstead v. Johnston*, 2 Atk. 46. *Southcot v. Watson*, 3 Atk. 228.

(s) *Colesworth v. Brangwin*, Prec. Ch. 323. *Bishop of Cloyne v. Young*, 2 Ves. 97. *Johnson v. Twist*, cit. 2 Ves. 166. *Buffar v. Bradford*, 2 Atk. 220. *Hawkins v. Mason*, Mos. 26, affirmed in Dom. Proc. 4 March 1729, 30.

(t) *Griffiths v. Hamilton*, 12 Ves. 298.

(u) *Brasbridge v. Woodroffe*, 2 Atk. 69. *Blinkhorn and Feast*, 2 Ves. 30. *Bowker v. Hunter*, 1 Bro. C. C. 328. *Griffiths v. Hamilton*, 12 Ves. 309. *Langham v. Sanford*, 2 Meriv. 22.

(x) *Oliver v. Frewen*, 1 Bro. C. C. 590.

tended as a compensation for their trouble in the Trusts of the *Real Estate* (y).

A *Specific Legacy* (unless it be by way of *exception* out of a general Gift) (z) will exclude a *sole* Executor (a), and a Gift of a Reversionary Interest will exclude the Executor (b); and distinct specific Legacies of *equal value* to several Executors (c) excludes them from the residue; but a *specific* Legacy to one of two Executors will not bar them (d), nor will distinct specific Legacies of *unequal value* to both, bar them (e).

If no expression (such as a Legacy to the Executor "for his care and trouble") (f), appears on the face of the Will, indicative of an Intention to make the Executor a Trustee of the residue, parol Evidence is not allowed (g); but when it is to be *inferred* and *presumed*, from expressions used in the Will, that the Executor should not take, the Executor (dangerous as the al-106*] lowance of such Evidence is) (h), may adduce *parol Evidence (i), and even, it seems, of declarations by the Testator, made *previous* or *subsequent* to (k) the making of the Will (l), as well as at the *time of the making* of it, to show that the intention at the time of making the Will was that he should have the residue, or that the next of kin were not to have it (m); but declarations of the Testator *after* the making his Will are of little weight; declarations made *before* his Will are of more weight, but not of equal importance with those which passed *at the time* of making his Will (n). An Executor may thus (not *rebut the Equity*, an inaccurate expression often used) (o) answer, or *rebut*

(y) *McCleand v. Shaw*, 2 Sch. & Lefr. 542.

(z) *Lady Granville v. Duchess of Beaufort*, 1 P. Wms. 114. 1 Bro. P. C. 305, and confirmed 1 P. Wms. 551.

(a) *Holford v. Wood*, 4 Ves. 90. *Southcote v. Watson*, 3 Atk. 240, 1.

(b) *Seley v. Wood*, 10 Ves. 74.

(c) See on this head *Nisbett v. Murray*, 5 Ves. 158.

(d) *Bishop of Cloyne v. Young*, 2 Ves. 98.

(e) 5 Ves. 158.

(f) See the cases ante, p. 99.

(g) *Osborn v. Villiers*, 2 Bac. Abr. 426, and stated from Register's Book, 3 Wood. Lect. 495.

(h) 2 P. Wms. 215.

(i) *Petit and Smith*, 1 P. Wms. 9. *Wingfield v. Atkinson*, 2 Vern. 673. *Lady Gainsborough v. Lord Gainsborough* 2 Vern. 252, and 1 P. Wms. 116. *Duke of Rutland v. Duchess of Rutland*, 2 P. Wms. 213. *Walton v. Walton*, 14 Ves. 322; and see *Bisnall v. Lewthwaite*, 2 Ves. jun.

649, and the observations there made, in the excellent judgment in that case by the Master of the Rolls, 2 Ves. jun. 471, &c.

(k) See *Walton v. Walton*, 14 Ves. 323.

(l) But see contra *Duke v. Duchess of Rutland*, 2 P. Wms. 209, where it is said, "discourses at different times from that of making the Will cannot be given in evidence." *Nourse and Finch*, 1 Ves. jun. 359. S. C. 4 Bro. C. C. 239, &c. *Pole and Lord Somers*, 6 Ves. 324.

(m) *Brasbridge v. Woodroffe*, 2 Atk. 69.

(n) *Langham v. Sanford*, 2 Meriv. 23.

(o) As in 2 Vern. 253, in marginal note on *Petit and Smith*, 1 P. Wms. 9. 1 P. Wms. 116, and in *Bishop of Cloyne v. Young*, 2 Ves. 95. 2 P. Wms. 213; and in *Lake v. Lake*, Amb. 127. S. C. Serj. Wilson's Rep. 313. *Stephenson v. Heathcote*, 1 Eden, 40.

(p) the presumption in Equity (q) against his legal Title (r). *Littlebury v. Buckley* (s) was the first Case where parol Evidence was admitted (t). The next of kin may *bring [*107 Evidence in answer to that adduced by the Executor.

To entitle the Executor by the Evidence, it ought to be plain and indisputable (u); and in most of the cases where an Executor has succeeded upon Evidence, it evinced declarations of direct intention in his favour (x). If the Evidence on both sides be contradictory, the next of kin will take (y.) There is no instance of an Issue being directed in these cases (z).

It seems, that if Legacies be given to two Executors, and one disclaims, his Legacy will not go to the other Executor, but is divisible amongst the next of kin (a).

If a Legacy is left to a Man described as Executor, and the office of Executor does not continue, he is not entitled to the Legacy; but this presumption may be rebutted by circumstances, showing that the Legacy was intended personally, and not merely as Executor (b); and there is no case of a Legacy specially given to an Individual, and the Residue afterwards given to that Individual by way of Legacy, in which that sort of doctrine has been applied (c).

Abatement of Legacies.

In case of a deficiency of Assets, Legacies by Will or Codicil (d), (unless they are specific Legacies) (e), *must abate in [*108 proportion; (1) nor will the Court strain to prefer one Legatee to another, but will let the general rule of equality take place, unless there be strong words to the contrary (g), and something

(p) See *Langham and Sanford*, 17 Ves. 449.

(q) See what is said in *Pole v. Lord Somers*, 5 Ves. 311, of *Littlebury v. Buckley*.

(r) See *Lady Granville v. Duchess of Beaufort*, 1 P. Wms. 114. *Urquhart v. Ling*, 10 Ves. 229.

(s) 2 Vern. 677.

(t) *Ambl.* 127.

(u) *Petit v. Smith*, 1 P. Wms. 9.

(x) *Langham v. Sanford*, 17 Ves. 450.

(y) *Hornaby v. Finch*, 1 Ves. jun. 344. S. C. 2 Ves. jun. 78. S. C. 4 Bro. C. C. 239, &c.

(z) *Trimmer v. Bayne*, 11 Ves. 515.

(a) Vid. the observation in the latter part of the Judgment in *Bowker v. Hunter*, 1 Bro. 334.

(b) *Stackpole v. Howell*, 13 Ves. 417. *Read v. Devaynes*, 3 Bro. C. C. 95.

(c) *Roach v. Haynes*, 8 Ves. 593.

(d) 2 P. Wms. 23.

(e) *Brown v. Allen*, 1 Vern. 31, and the Cases cited in note (1) to that case.

(g) See *Blower v. Morret*, 2 Ves. 421.

(1) If one legatee be paid, and afterwards there appears to be a deficiency of assets to pay the others, he must refund a proportionable part. *Lupton v. Lupton*, 2 Johns. Ch. Rep. 614. But if the deficiency of assets be occasioned by a *devastavit* the legatee who has been paid, may retain his legal advantage, as against the other legatees, but not as against creditors. 1b.

insuperable in the Will (*h*) that does not justify the Court in doing it (*i*).

The Court has disclaimed laying weight on particular words, as the saying, "*Imprimis*," or "in the first place" (*k*), or a direction for the time of payment (*l*), as that one Legacy shall be paid in three months, another in six, and another in twelve months (*m*); but where the intention is clear it will be attended to; as, where one by Will gave several Legacies, and afterwards, in the same Will, expressing an idea that there would be a Surplus, *therefore* gives further Legacies, the Legacies in the former part of the Will were, upon a deficiency, preferred (*p*).

A Legacy to an Executor for *care and pains* makes no difference (*o*). If, however, a Legacy be given to a Wife in consideration that she release Dower, it will be preferred (*p*).

109*] If Money be bequeathed for a Monument (*q*), or *to buy Land, or as it has been held, an Annuity (*r*), it is considered as a specific Legacy, and will not come in average.

As charitable Legacies were by the *Civil Law* preferred to other Legacies, so, in some of the earlier Cases the Court of Chancery, on a deficiency of Assets, gave a preference to Charitable Legacies (*s*); but subsequent Cases have established, that charitable Legacies, on a deficiency of Assets, are to abate proportionably with other Legacies (*t*).

A residuary Legatee, on a deficiency of Assets, has been allowed under special circumstances, to come in, *pari passu*, with the other Legatees; as, where the Testator at the time of making his Will knew what the Surplus would amount to, and gave the same as a Legacy to his eldest Son (*u*).

If *specific* and *pecuniary* Legacies are given, and there are not Assets to pay both, the specific Legatee is preferred, and takes his whole Legacy (*x*), and does not abate in proportion with

(*h*) As in *March v. Evans*, 1 P. Wms. 668. *Lewin v. Lewin*, 2 Ves. 47.

(*i*) *Clarke v. Sewell*, 3 Atk. 99.
(*k*) *Brown v. Allen*, 1 Vern. 31.
Tilaly v. Throckmorton, 2 Ch. Ca. 132. *Lewin v. Lewin*, 2 Ves. 415.

(*l*) *Blower v. Morret*, 2 Ves. 421.
Clarke v. Sewell, 3 Atk. 99.

(*m*) Anon. 10 July, 1752, MS.
(*n*) *Attorney-General v. Robins*, 2 P. Wms. 23.

(*o*) 2 Vern 434. 2 Atk. 171. 2 P. Wms. 25.

(*p*) *Burridge v. Bradyl*, 1 P. Wms. 126. *Davenport v. Fletcher*, Amb. 244, and *Blower v. Morret*, there mentioned; see also 1 Ves. 133. Anon. 10 July, 1752. MS.

(*q*) 1 P. Wms. 423.

(*r*) 1 P. Wms. 126. *Contra Hinton v. Pinke*, 1 P. Wms. 539, and what is said in *Hume v. Edwards*, 3 Atk. 693; and in *Lewin v. Lewin*, 2 Ves. 417, particularly as to *Hinton v. Pinke*.

(*s*) *Fielding v. Bound*, 1 Vern. 230.
(*t*) *Attorney-General v. Hudson*, 1 P. Wms. 674. *Masters v. Masters*, ib. 422. *Attorney-General v. Robins*, 2 P. Wms. 23.

(*u*) *Dyose v. Dyose*, 1 P. Wms. 305; but see what is said of that case in 1 Bro. C. C. 478, and in *Humphreys v. Humphreys*, mentioned in note to 1 P. Wms. 306, n. 2.

(*x*) *Clifton v. Burt*, 1 P. Wms. 679, 680. *Brown v. Allen*, 1 Vern. 31. S. P. 2 Salk. 416.

other Legatees (y), but they may abate proportionably amongst themselves (z), unless where the Legacy of any one is out of a particular* fund by itself, and others upon another fund, [*110 in which case each bears his own loss (a).

A Legatee of an Annuity for Life, charged on the personal Estate, is not considered as a *specific* Legatee, and therefore, in case of a deficiency of Assets must abate in proportion with other Legatees (b).

If Legacies are given payable at a future time, and at the death of the Testator the Assets are deficient, but by profits in the mean time accruing, the Assets afterwards become sufficient, all the Legacies must be paid, for those Profits are part of the personal Estate (c).

If an Executor pays one Legatee, and afterwards becomes insolvent (d), and it appears there is a deficiency of Assets, the Legatee is compellable in Equity, and in Equity only, (for no action lies) (e) to refund a proportionable part of what has been paid (f); (1) and it is the same where the Legacy is paid in virtue of a Decree (g); but if the deficiency of Assets is occasioned by the *wasting* of them by the Executor, a Legatee who has recovered his Legacy* (h), or to whom it has been [*111 voluntarily paid (i), is not compellable to refund. (2)

HAVING concluded the observations on the abatement of Legacies, we shall make a remark or two on the *payment* of Legacies.

- (y) Webb v. Webb, 1 Vern. 111.
 (z) Hume v. Edwards, 3 Atk. 693.
 (a) Tilsley v. Throgmorton, 2 Ch. Rep. 132.
 (b) Sleech v. Thorrington, 2 Ves. 561.
 (c) Green v. Elkins, 2 Atk. 476.
 (d) Francis' Max. in Equity, p. 12, note (a) in margin.
 (e) Johnson v. Johnson, 3 Bos. & Pull. 169.
 (f) 1 Vern. 94. Edwards v. Freeman, 2 P. Wms. 447. Davis v. Davis, 1 Dick. 32. Roberts v. Roberts, C. C. 487; but see contra Newman v. Barton, 2 Vern. 405, and Coppin v. Coppin, 2 P. Wms. 296. which, however seems to have been decided as it was from the hardship of the case.
 (g) Newman v. Barton, 2 Vern. 305. 2 Ch. Ca. 9. Gittens v. Steel, 1 Swanst. 199. On refunding sums paid under a decree which is reversed, if the Legatee is entitled to other Funds making interest in the hands of the Court, he will be charged with interest, but not if he has no further concern in the Estate, *ibid*.
 (h) Anonymous, 1 P. Wms. 495; and see Noel v. Robinson, 1 Vern. 94, contra Hardwick v. Mynd, 1 Anstr. 112. Anon. 1 Vern. 162.
 (i) Orr v. Kaines, 2 Ves. 194. and see Lowthian v. Hassell, 4 Bro. C. C. 167.

(1) Vide *Lupton v. Lupton*, 2 Johns. Ch. Rep. 614.
 (2) Vide *Lupton v. Lupton*, *ut supra*. Where land is devised, charged with the payment of a legacy, and the devisee accepts the devise, he is personally liable for the legacy; and he has no right to demand of the legatee, before payment, a security to refund, in case of deficiency of assets. *Glen v. Fisher*, 6 Johns. Ch. Rep. 33.

Where a Legacy is given to an Infant, a payment to the Father is not valid; but if the sum be not more than 100*l.*, payment has been allowed to the Child (*k*).

Formerly, payment to the Father was allowed (*l*); but since the Case of *Dagley v. Tolferry* (*m*), the idea of the Court has been, that it is not a good payment, and that even in the case of an *adult* Child it is not good, unless done with the consent of the Child, or made so by a subsequent ratification (*n*). But where a Legacy is given to *A.* to be divided between him and his Family, it may be paid to *A.* (*o*).

As payment of a Legacy to the Father of an Infant was not allowed, it became necessary for Infant Legatees to file Bills for the payment of their Legacies (*p*); and it was held, that 112*| when a Legacy *was given to an Infant, the Testator makes it necessary to come into this Court for directions how to lay it out, and therefore the application ought to be considered as an encumbrance on his Estate, and the Costs paid out of the Assets (*q*); but by the Statute (*r*), such Suits are now rendered unnecessary (*s*); and the Executor may under that Act pay the Legacy into Court, and the Infant when of age may petition for it.

If a Legatee be abroad, and has given to another a *general* Power of Attorney, though without any particular authority to receive the Legacy specifically, he is nevertheless entitled to receive it (*t*) (*1*).

Resulting Trusts.

In consequence of the *Statute of Frauds*, nothing can be construed as *Resulting Trusts*, but what are there called Trusts by operation of Law, which are of two kinds, 1st, where an Estate is purchased in the name of one, but the Money or consideration is given by another, or, 2dly, where a Trust is declared only as to part, and nothing said as to the rest, in which case what

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| (<i>k</i>) See <i>Phillips v. Pagett</i> , 2 Atk. 8. | Bro. C. C. 186; and see <i>Robinson v.</i> |
| (<i>l</i>) As in <i>Halloway v. Collins</i> , 1 | <i>Tickell</i> , 8 Ves. 142 |
| Eq. Abr. 300. | (<i>p</i>) <i>Whopham v. Wignfield</i> , 4 Ves. |
| (<i>m</i>) 1 P. Wms. 285. S. C. 1 Eq. | 630. |
| Abr. 300. <i>Gilb. Eq. Rep.</i> 103; but | (<i>q</i>) <i>Anon. Mos.</i> 5. |
| see the remark on this case in <i>Phil-</i> | (<i>r</i>) 36 Geo. 3. c. 52. s. 32. |
| <i>lips v. Paget</i> , 2 Atk. 31. | (<i>s</i>) <i>Whopham v. Wingfield</i> , 4 Ves. |
| (<i>n</i>) <i>Cooper v. Thornton</i> , 3 Bro. C. | 630. |
| C. 97. | (<i>t</i>) <i>Carr v. Estabrook</i> , 2 Cox, 390. |
| (<i>o</i>) <i>Ib.</i> 96, confirmed on appeal, 3 | |

(1) Though the statute of limitations is no bar to a legacy, in equity, yet, the court, in regard to very stale demands, will, in their discretion, adopt the rule of law. *Arden v. Arden*, 1 Johns Ch. Rep. 313.

It is the settled doctrine of equity, that a legacy cannot be barred by the statute of limitations. *Isby v. McCrae*, 4 Des. 432. *Ward v. Reeder*, 2 Har. and M'Hen. 154.

remains undisposed of, results to the Heir at Law (*u*). There are no instances but these two, where this Court has declared Resulting Trusts by operation of Law, unless in cases of Fraud, and where transactions have been carried on *mala fide* (*x*).

*1. Soon after the Statute of Frauds passed, it was de- [113 terminated that if an Estate be purchased with the Money of *A.*, and the Estate is conveyed to *B.* who is a Stranger, *B.* will be a Trustee for *A.*, and it is such a Resulting Trust by implication of Law, as is saved by the Statute, (1) and needs no declaration of Trust (*y*). "It is," says Lord Hardwicke, "a certain, known Rule, that when a Man purchases Land in the name of another, it is a Resulting Trust (*z*)."² The result of the Cases on this subject appears to be, that the Trust of a legal Estate, whether Freehold, Copyhold, or Leasehold; whether taken in the names of the Purchasers and others jointly (*a*), or in the name of others without that of the Purchaser; whether in one name or several; whether jointly or successively, results to the man who advances the Purchase-money: and this, in analogy to the Rule of the Common Law, that where a Feoffment is made without consideration, the Use results to the Feoffor (*b*); but this Resulting Trust may be rebutted by written (*c*) or parol Evidence (*d*) (2). The Law implies a Trust in these cases for the Person who paid the Money (*e*), but the Party must clearly prove the payment of the Money (*f*). *Such proof may appear either [*114 from expressions or recitals in the Purchase-deed (*g*); or from

(*u*) Lloyd v. Spillet, 2 Atk. 150. Harcourt and Weymouth, 2 Vern 645.

(*z*) Lloyd v. Spillet, 2 Atk. 150. A learned writer, (2 Fonb. Eq. 117, in note,) has criticised this proposition, and thinks it inaccurate, but, as it seems to me, without success.

(*y*) Lade v. Lade, 1 Sergt. Wilson's Rep. 21.

(*x*) 2 Ventris, 390. Gascoigne v. Thwing, 1 Vern. 366. Finch v. Finch, 15 Ves. 50. S. C. MS. Ryall v. Ryall, 1 Atk. 59. S. C. Ambler 413.—Smith v. Baker, 1 Atk. 385. 2 Atk. 75.

(*a*) See Rider v. Kidder, 10 Ves. 367. Bengier v. Drew, 1 P. Wms. 780.

(*b*) Dyer v. Dyer, 2 Cox, 92, where the previous cases on the subject are cited.

(*c*) Ibid.

(*d*) Carter v. Ratty, 12 July 1745. MS.

(*e*) See Young v. Peachy, 2 Atk. 256.

(*f*) Willis v. Willis, 2 Atk. 7.

(*g*) See 2 Vern. 168. Prec. Ch. 104. Kirk and Webb, ib. 84, cited 1 Sanders on Uses, p. 258.

(1) Vide *Boyd v. McLean*, 1 Johns. Ch. Rep. 582. *Botsford v. Burr*, 2 Johns. Ch. Rep. 405. If part only of the consideration is paid, the land will only be charged with the money advanced, *pro tanto*. But if no part of the consideration has, in fact, been paid by him, who sets up a resulting trust, he will not be allowed to shew, by parol, that the purchase was made for his benefit. Nor will any payment or advance of money, after the purchase has been completed, raise a resulting trust. *Botsford v. Burr*, *ut supra*. And so, in order to raise a trust by operation of law, an actual payment of money, by the *cestui que trust*, at the time of the purchase, must be proved. *Steere v. Steere*, 5 Johns. Ch. Rep. 1.

(2) Vide *Botsford v. Burr*, 2 Johns. Ch. Rep. 405.

some memorandum or note of the nominal Purchaser (*h*); or from his answer to a Bill of Discovery (*i*); or from papers left by him, and discovered after his death (*k*) (1). Whether, after the death of the supposed nominal Purchaser, parol proof alone is admissible, against the express declaration of the Deed, has been a subject of controversy (*l*), but it seems, it may (*m*) (2); but parol Evidence is not allowed to show that a Party having agreed for the purchase of an Estate in his own name, and paid for with his own money, had in fact purchased it on behalf of another Person (*n*).

There is, however, an exception to the Rule, introduced by the Ship Registry Acts, in the case of a Ship; for if *A.* purchase a Ship in the name of *B.* and the sale is registered in the name of *B.*, *B.*'s Title cannot be dislodged (*o*).

And where a Ship was purchased with joint partnership Property, but registered in the name of only one of the Partners, it was held, owing to the strong provisions of the Registry Acts, 115*] that Even against a *claim by Creditors, no implied Trust arose in favour of the Partners, in whose name the Ship was not registered (*p*).

Where two or more purchase Lands, and advance the Money in equal proportions, and take a Conveyance to them and their Heirs, this is a Joint-tenancy, that is, a Purchase by them jointly of the chance of survivorship, which may happen to the one of them as well as to the other (*q*); but where the proportions of the Money are not equal, and this appears in the Deed itself, this makes them in the nature of Partners; and however the legal Estate may survive, yet the Survivor is considered but as a Trustee for the others, in proportion to the sums advanced by each of them. So if two or more make a joint Purchase, and

(*h*) *O'Hara v. O'Neal*, 2 Eq. Abr. 475.

(*i*) *Cottington v. Fletcher*, 2 Atk 155; but see *Edwards and Moore*, 4 Ves. 23, cited 1 Sand. 258.

(*k*) *Ryall v. Ryall*, Ambl. 413. *Lane v. Dighton*, ib. 409.

(*l*) See 1 vol. Sand. on Uses, p. 259, and the note to *Lloyd and Spillet*, 2 Atk. 150. *Roberts on Frauds*, p. 99. *Sudg. Vend. and Purch.* 508, last edition.

(*m*) See *Lench v. Lench*, 10 Ves. 511. *Carter v. Ratty*, 12 July 1745. MS.

(*n*) *Bartlett v. Pickersgill*, 1 Cox, 15.

(*o*) *Ex parte Houghton*, 17 Ves. 251.

(*p*) *Ex parte Yallop*, 15 Ves. 60; and see *Curtis and Perry*, 6 Ves. 739.

(*q*) *Lake v. Gibson*, 1 Eq. Abr. 291. *Moyse v. Gyles*, 2 Vern. 285.

(1) It is well settled, that parol evidence is admissible to prove the payment of the money on which the resulting trust arises, it not being within the statute of frauds. *Boyd v. M'Lean*, 1 Johns. Ch. Rep. 582. *Botsford v. Burr*, 2 Johns. Ch. Rep. 405.

(2) Such evidence is admissible, after the death of the nominal purchaser, not only against the face of the deed itself, but in opposition to the answer of the trustee, denying the trust. But the evidence, under such circumstances, is to be received with great caution. *Boyd v. M'Lean*, 1 Johns. Ch. Rep. 582.

afterwards one of them lays out a considerable sum of Money in repairs and improvements, and dies, this is considered as a Lien on the Land, and a Trust for the Representative of him who advanced it; and in all other cases of a joint undertaking or partnership, either in trade or in any other dealing, they will be considered as Tenants in common, or the Survivors as Trustees for those who are dead (r).

In *Crop v. Norton* (s) language is used, from which it might be inferred that the rule in these Cases does not apply to a *joint advance* upon a Purchase in the name of one, but that Case has been considered as *decided, not upon a general principle, [*116 but on its particular circumstances, and it has been held that a Trust will arise upon such *joint advance* (t).

If, however, an Estate be purchased with the Money of A. in the name of his Child, whether legitimate or illegitimate (u), or in the name of his Grandchild (x), (if the Father be alive it may be different) (y); this distinguishes it from the case of a Stranger in which there is not that natural affection that would repel the presumption arising from the advance of the Money; and it will be an advancement of such Child or Grandchild, unless some contemporaneous (z) declaration can be proved (a), or some act is done to manifest an intention that the Son shall take as a Trustee (b). Possession taken by the Father at the time would, it has been said, amount to such evidence (c). The evidence of the intention of the Father that he meant his Son to be a Trustee for him, must, to have the effect of making him a Trustee, apply to the time of the Purchase; subsequent acts will not enable him to convert an advancement for his Son into a beneficial Purchase for himself (d). In some of the earlier cases it was held, that though the Father should take possession of the Estate, and receive the Rents and Profits during the Child's Infancy, *that would not raise a Trust for the Fa- [*117 ther (e). It has however been held, that if the Father received the Rents and Profits after the Child was of age (f), or where the Child was of age when the Estate was purchased (g), or he

(r) *Lake and Gibson*, 1 Eq. Ca. Abr. 291. S. C. 3 P. Wms. 138, under name of *Lake v. Craddock*.

(s) 2 Atk. 74. S. C. 9 Mod. 233.

(t) *Wray v. Steel*, 2 Ves. & Bea. 388.

(u) *Beckford v. Beckford*, Loft. 490. *Fearne Posth.* 327. 2 Fonbl. Eq. 124, 5.

(x) See *Ebrand v. Dancer*, 2 Ch. Ca. 26.

(y) *Ibid.* *Lloyd v. Read*, 1 P. Wms. 60. 1 Eq. Abr. 382.

(z) *Elliott v. Elliott*, 2 Ch. Ca. 231; and see *Finch v. Finch*. 15 Ves. 52. S. C. MS. *Murless v. Franklin*, 1 Swanst. 13.

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(a) *Lord Gray's case*, 2 Free. 6.

(b) 1 Swanst. 18.

(c) *Ibid.* 17.

(d) *Murless v. Franklin*, 1 Swanst. 19.

(e) *Mumma v. Mumma*, 1 Atk. 19.

Lamplugh v. Lamplugh, 1 P. Wms.

113. *Taylor v. Taylor*, 1 Atk. 386.

Stileman v. Ashdown, 2 Atk. 480.

Finch 340. *Reddington v. Reddington*,

3 Ridgw. P. C. 106. *Elliott v.*

Elliott, 2 Ch. Ca. 231. *Sed quæ* see

what is said in *Murless v. Franklin*,

1 Swanst. 17.

(f) *Lloyd v. Read*, 1 P. Wms. 608.

(g) *Lex Prætoria*, MS.

was before provided for, the Son would be a Trustee. "If a Father has provided for his Son," says Lord *Nottingham*, "he is under no further obligation to provide more than for a Stranger, and else no Father could trust his Child; and this difference I take, and shall always observe" (h); but it has been held, that a *Reversion* settld on the Son, expectant on the Mother's death, is not such a provision as will prevent the Son taking (i).

A difference (not sustainable, it seems,) has been taken between a Purchase in the name of a Son and of a Daughter; for though Sons are often provided for by a Settlement of Lands, yet Daughters seldom are, and therefore the presumption is not so strong (k).

Whether the Purchase by the Father, in the name of his Son, be of a *Fee simple* or a *Reversion*, is immaterial, for the proximity or possible remoteness of the Possession, does not affect the Rule (l).

118*] *If the Father and another paid the Money, it would not be an advancement of the Child (m); and if the Father bought the Estate in the names of his Son and a Trustee (n), or, as it seems, in the name of himself and his Son (o), (though as to this Lord *Hardwicke* expressed a different opinion) (p), still has the Purchase been considered as an advancement; but the Father will have the benefit of Survivorship in case the Son die during his minority; and the Son is not entitled to the benefit of Survivorship as against a Judgment Creditor of the Father (q). It was anciently a practice to join the Son in a Purchase to avoid a Wardship (r). In a Case where a Copyhold was granted to A. and B. his Wife, and C. his youngest Son, to take in succession for their Lives, and the Life of the Survivor, it was held that C. was not a Trustee of his Life Interest for A., but took it beneficially as an advancement from his Father (s). When a Purchase of a Copyhold is in the name of two Sons, and the eldest Son is not the first named, this is a Purchase for the benefit of the Sons, to take successively (t).

If a Purchase be made by a husband in the name of his Wife, 119*] it will not be considered as an implied *Trust, but she

(h) *Elliott v. Elliott*, 2 Chan. Ca. 232. *Pole v. Pole*, 1 Ves. 76. *Lloyd v. Read*, 1 P. Wms. 607.

(i) *Lamplugh v. Lamplugh*, 1 P. Wms. 111.

(k) *Gilb. Lex Prætoria*, MS. who cites C. C. 24, 30; but see *Lady Gorge's case*, 3 Cro. 550, and *Bedwell v. Frome*, mentioned in *Dyer v. Dyer*, 2 Cox, 97.

(l) *Finch v. Finch*, 14 Ves. 50. *Dyer v. Dyer*, 2 Cox, 92. *Murless v. Franklin*, 1 Swanst. 13.

(m) *Finch v. Finch*, MS. 23 March 1806.

(n) *Lamplugh v. Lamplugh*, 1

Wms. 111.

(o) *Scroope and Scroope*, 1 Ch. Ca. 27. *Back v. Andrews*, 2 Vern. 120.

8. C. Precedents in Chan. p. 1, edit. 2. 3 Salk. 367. *Dyer v. Dyer*, 2 Cox,

92, noticed in note 1 to 1 P. Wms. 112, and in *Watkins on Copyholds*, 216; and see *Finch v. Finch*, 14 Ves. 50. S. C. MS.

(p) 2 Atk. 480.

(q) *Stileman v. Ashdown*, 2 Atk. 480. S. C. Ambl. 13.

(r) 1 Ch. Ca. 28. 3 Salk. 367.

(s) *Dyer v. Dyer*, 2 Cox. 92.

(t) *Murless v. Franklin*, 1 Swanst.

18.

will be beneficially entitled (u), for a Wife cannot be a Trustee for her Husband (x).

If a Bond be taken by A. in the name of B. an implied Trust will be raised in favour of A. ; but if a Grandfather, the Father being dead, takes a Bond in the name of his Grandchild, it will be considered as an advancement of the Grandchild (y). If the Father had been alive, the Child would have been a Trustee (z). If a Bond be taken by A. in the name of B., and B. becomes *felo de se*, relief will be given against the King, upon the Statute 33 Hen. 8, c. 39 (a).

If A. buys Stock in the Public Funds in the name of B., who has no proof that it was meant as a Provision for her, there will be an implied Trust raised in favour of the person who paid the Money (b). But if a person having Stock in the Public Funds transfers the same into his own and another's name, and dies, the Survivor is, *prima facie*, entitled to it as a Gift, and the *onus* lies on the representatives of the deceased to show that it was not so intended (c).

It is observable, that if A. purchases Lands in his own name, but in Trust for B., and becomes engaged for Debts of B., and B. files a Bill to have the Lands *on payment of what the [*120 Defendant paid for them, B. will be decreed to pay not only the Purchase-money of the Estate, but also the amount of the other Monies advanced (d).

2. We have already seen (e), that in the absence of express or demonstrable intention to the contrary, it is an established Principle, that Money directed to be employed in the purchase of Land, and Land directed to be sold and turned into Money, are to be considered "by the transmutation of a Court of Equity," (to use Lord Hardwicke's expression) (f), as that species of Property into which they are directed to be converted (g); and this, in whatever manner the direction is given, whether by Will, by way of Contract, Marriage Articles, Settlement, or otherwise; and whether the Money is actually deposited, or only covenanted to be paid; whether the Land is actually conveyed,

(u) See *Rider v. Kidder*, 10 Ves. 367, and *Back v. Andrews*, 2 Vern. 67, 123. S. C. Proc. in Ch. 1 edit. 2. *Batch v. Andrews*, Ch. Ca. 53; but see *Smith v. Baker*, 1 Atk. 385. *Mence v. Mence*, before V. C. Plumer, 18 July 1815. MS.

(x) *Kingdon v. Bridges*, 2 Vern. 67.

(y) 1 Eq. Abr. 392.

(z) *Lloyd and Read*, 1 P. Wms. 607.

(a) *Hix v. Attorney-General*, Hard. 176.

(b) See *Rider v. Kidder*, 10 Ves.

366, and *Mortimer and Davis*, mentioned in 10 Ves. 362.

(c) *George v. Howard*, in Exchequer, 17 July, 1819. MS.

(d) 2 Ch. Ca. 87.

(e) *Ante*, Vol. 1. 365.

(f) *Guidot v. Guidot*, 3 Atk. 256.

(g) See *Doughty v. Bull*, 2 P. Wms. 323. *Best v. Stamford*, 1 Balk. 154. *Attorney-General v. Johnston*, Amb. 580. *Vid. Gibbs v. Ogier*, 12 Ves. 415. *Berry v. Usher*, 11 Ves. 87. *Robinson v. Taylor*, 2 Bro. C. C. 589. S. C. 1 Ves. jun. 44. *Williams v. Coade*, 10 Ves. 500.

or only agreed to be conveyed (*h*). The only question in cases of this kind is, whether the character of Land or Money is definitively and imperatively affixed to the Property; or whether it is left as matter of uncertainty, in what manner the owner of the Property intended it to descend (*i*). If the Intention is 121*] discoverable internally in the Instrument,* that will determine whether Money is to be considered as Land, or Land as Money; for the Rule adverted to only applies in the absence of express or demonstrative Intention (*k*). If the Party entitled to the Property under the Instrument, having a right to elect in which shape he shall take it, has declared that Election, he, or those to whom he disposes of the Property, will take it in that quality which he has so elected to take it; but until an Election is made, the Property remains and passes as it would have done if a conversion had actually taken place as directed, and the *onus* lies on those who would show an Election to take it in another character than that it would have if controverted (*l*). The Decisions have, it seems, overruled the general proposition of *Lord Rosslyn* (*m*), that, in the absence of an Election, the Property in these cases was to be taken as it happened to be at the death of the Party through whom it is claimed (*n*). If, indeed, the Person entitled to the Property is both Heir and Executor to the Person settling it, and he makes no declaration of his intention respecting it, it will, it seems, go according to the quality in which it was left by him at his death (*o*).

122*] Where a Person dealing upon his own Property *only, has directed a Conversion for a particular special purpose, or out and out, but the produce to be applied to a particular purpose, if the purpose fails, the intention fails, and a Court of Equity regards him as not having directed the Conversion (*o*).

If, therefore, there be a Devise of Real Estate for the payment of Debts, and nothing more is meant than to make a Provision for the Debts, all beyond what is required for that purpose, will remain *real Estate*, and as such go to the Heir (*p*); the general Principle being, that the Heir takes all that which is not for a defined and specific purpose given by the Will (*q*). If

(*h*) *Fletcher v. Ashburner*, 1 Bro. C. C. 499; and see Mr. Hargrave's able argument in *Pulteney v. Dartington*, 1 Bro. C. C. 226, 7. 2 Meriv. 521.

(*i*) *Vid. Wheldale v. Partridge*, 5. Ves. 397. Decree affirmed, 8 Ves. 227; and see *Biddulph v. Biddulph*, 12 Ves. 161.

(*k*) *Trafford v. Boehm*, 3 Atk. 446. See *Wheldale v. Partridge*, 5 Ves. 388, and S. C. on appeal, 8 Ves. 227; and see also *Thornton v. Hawley*, 10 Ves. 129, which cases arose in Deeds.

(*l*) See on this subject *Stead v. Newdidge*, 2 Meriv. 521.

(*m*) In *Walker v. Denne*, 2 Ves. jun. 170.

(*n*) See *Kirkhman v. Milles*, 13 Ves. 338.

(*o*) See *Wheldale v. Partridge*, 8 Ves. 285.

(*o*) *Ripley v. Waterworth*, 7 Ves. 435.

(*p*) *Wright v. Wright*, 16 Ves. 191. *Hill v. Cock*, 1 Ves. & Bea. 174. *King v. Denison*, 1 Ves. & Bea. 272. See *Collins v. Wakeman*, 2 Ves. 687. *Southouse v. Bates*, 2 Ves. & Bea. 396. *Culpepper v. Aston*, 2 Ch. Ca. 115.

(*q*) *Chity v. Parker*, 2 Ves. jun. 271.

the intention is to convert it into personal property *for all the purposes of the Will*, though *some* of those purposes should fail, and though in consequence of that failure part results to the heir, it would result to him as *personal Estate*, and be so considered, in a question between his Representatives (r).

In cases of Wills, it is always important to consider, whether the Testator meant to give to the produce of the Real Estate the quality of *Personalty*, *to all intents*, or only so far as respected the *particular purposes* of the Will; for unless he has sufficiently declared his Intention, not only that the Realty shall be converted* into *Personalty for the purposes of the Will*, [*123 but further, that the produce of the Real Estate shall be taken as *Personalty whether such purposes take effect or not*, so much of the Real Estate, or the produce thereof, as is not effectually disposed of by the Will at the time of the Testator's death, (whether from the *silence* (s), or the *inefficacy* of the Will itself, or from subsequent *Lapse*,) will result to the Heir (t).

If one gives to A. and his Heirs all his real Estate, "*charged with his Debts*," that is a Devise to him for a particular purpose; but not for that purpose only. If the Devise is, "*upon Trust to pay his Debts*," that is a Devise for a particular purpose, and has a different effect; the former is a Devise of an Estate of Inheritance for the purpose of giving the Devisee the beneficial Interest, subject to a particular purpose; the latter is a Devisee for a particular purpose, with no Intention to give him any beneficial Interest. Where, therefore, the whole legal Interest is given for the purpose of satisfying Trusts expressed, and those Trusts do not in their execution exhaust the whole, so much of the beneficial Interest as is not exhausted belongs to the Heir; but where the whole legal Interest is given for a *particular [*124 purpose, with an intention to give to the Devisee of the legal Estate the beneficial Interest if the whole is not exhausted by that particular purpose, the Surplus goes to the Devisee, it being intended to be given to him (u).

If a sum of Money be devised in Trust to be laid out in Land, and the Uses to which the Land should be applied are not declared, the benefit of that Money, it seems, will go to the Heir at Law, as a Resulting Trust, (y). So, on the other

(r) 16 Ves. 191; and see Hewit and Wright, 1 Bro. C. C. 86, and Kidney v. Coussmaker, 2 Ves. jun. 268.

(s) Collins v. Wakeman, 2 Ves 687.

(t) See Mr. Cox's able note to Cruse v. Barley, 3 P. Wms. 22, note 1, and the cases there quoted. See also Randall v. Bookey, 2 Vern 425. Stonehenge v. Evelyn, 3 P. Wms. 253. Douroure v. Motteux, 1 Vez 320. Ackroyd v. Smithson, 1 Bro. C. C. 503. Gibbs and Ougier, 12 Ves.

415. Berry and Usher, 11 Ves. 87. Robinson v. Taylor, 2 Bro. C. C. 589. S. C. 1 Ves. jun. 44. Williams v. Coade, 10 Ves. 500. Kennel v. Abbot, 4 Ves. 810. Hooper v. Goodwin, 18 Ves 156. Stansfield v. Habergbam, 10 Ves. 278. Hill v. Cook, 1 Ves. & Bea. 174. M'Clealond v. Shaw, 2 Sch. & Lefr. 545. 6

(u) King v. Denison, 1 Ves. & Bea. 272, 3.

(y) Hayford v. Benlows, Amb. 582.

hand, if a real Estate be devised to be sold, and no particular directions are given, how the Purchase-money should be applied, in whole or in part, the Money undisposed of will, it seems, go to the Executor, to be applied in a course of distribution, or to a residuary Legatee of the personal Estate, if any such there be (z).

If the purpose for which the Conversion was directed, is *illegal*, the property, it seems, will go as if unconverted (a).

Where real Estate is devised to Executors, and there is a declaration that they shall sell, and the produce shall go as the residue of the personal Estate, it will pass, it seems, subject to all that would affect the residue of the personal Estate, and therefore to Debts (b).

125*] Where a Testator creates an Executory Trust or *Devise, to take effect within the limit allowed by Law, and makes no Disposition of the intermediate beneficial Interest, the Trust or Equitable Estate will descend to the Heir, until the Contingency happens upon which the equitable executory Devise is to arise (b).

Upon a Devise to a good charitable Use, the Heir has no right to the Rents and Profits accrued before the Devise is carried into effect (c).

Where a Term was created by Will, but no Trusts of it declared, and the Estate was devised to Tenants for Life, with Remainders over, it was holden that there was no resulting Trust as to the Term, but that it attended the Inheritance (d).

Implied Trusts.

It may be stated as a Rule in Equity, that all persons coming into Possession of Trust Property, with notice of the Trust, shall be considered as Trustees, and bound, with respect to that special Property, and the execution of the Trust (e). (1)

(z) Ibid. 583.

(a) See Townley v. Bedwell, 6 Ves. 194.

(b) Kidney v. Consmaker, 2 Ves. jun. 269.

(b) Sanders on Uses and Trusts, 1 vol. 203. Fearne on Executory Devises, 537. Hopkins v. Hopkins, 1 Atk. 584. S. C. For. 44, and in MS. Attorney-General v. Bowyer, 3 Ves.

725. Stanley v. Stanley, 16 Ves. 491.

(c) Attorney-General v. Bower, 3 Ves. 725.

(d) Sidney v. Miller, Coop. 206, overruling the dictum of Lord Hardwicke in Browne v. Jones, 1 Atk. 191.

(e) Daniels v. Davison, 16 Ves. 249. Adair v. Shaw, 1 Sch. & Lefr. 262. Elsm. Obs. 94. Nels. 378.

(1) Vide *Murray v. Ballou*, 1 Johns. Ch. Rep. 566. *Shepherd v. M'Evers*, 4 Johns. Ch. Rep. 136. *Murray v. Sylburn*, 2 Johns. Ch. Rep. 441. *Wilson v. Mason*, 1 Cranch 100. *Skiras v. Caig and Mitchell*, 7 Cranch, 48. *Russell v. Clark's Exrs.* 7 Cranch. 97. Where a trustee has accepted the trust, and entered on its execution, he cannot, afterwards, without the consent of the *cetui que trust*, or the sanction of the court, surrender it. *Shepherd v. M'Evers*, *ut supra*. And where a trust is created for the benefit of a third person, without his knowledge, he may, afterwards, affirm it, and

To this general Rule, however, there is an exception in the case of a *Disseisor*, *Abettor*, or *Intruder*, who will not be seised to an Use, although he hath *notice, for they are not in [*126 in privity of the Estate to which the Use was annexed, but in the post (f). In such case the *Cestui que Use* may by Bill compel the Feoffee to enter upon the Disseisor, or to recover the Land against him at Common Law, and then this Court will compel the Feoffees to execute the Estate according to the Use (g).

That Executors and Administrators are considered as Trustees, had before been stated (h). On this ground it has been held, that goods taken by the Wife in *autre droit*, do not pass by Marriage, to the Husband, but if he takes them, they are applicable to the Trust to which they were subject in the hands of the Wife (i).

Accordingly, where a Feme Covert obtains Administration, and the Goods are wasted during the Coverture, and the Husband dies, his Assets are chargeable in Equity for the Waste committed during the Coverture (h); the Wife surviving would be charged, it seems, if Assets of the Husband prove insufficient (m). If the Wife trades with the Assets the Husband is liable (n).

But the Husband is not liable in respect of Assets received by the Wife whilst a Feme Sole, but only for such as came to his hands after the Intermarriage (o), *unless after the death [*127 of his Wife he has any Estate in the character of Administrator to her (p).

A Fine levied in favour of one who has notice of a Trust (q), or who, not having notice, is a Purchaser without consideration (r), will not bar the *Cestui que Trust*. A Mortgagee, therefore, cannot by Fine and Nonclaim bar the Equity of Redemption

(f) 1 Rep. 122.

(g) 1 Rep. 139.

(h) See title Assets.

(i) 1 Sch. & Lefr. 271.

(j) Adair v. Shaw, 1 Sch. & Lefr.

243.

(m) Ibid. 257, overruling what is said in Beynon v. Gollins, 2 Bro. C. C. 323; and see Bellow v. Scott, Str. 440.

(a) 1 Sch. & Lefr. 269.

(e) Sanderson v. Crouch, 2 Vern. 118; and see 1 Sch. & Lefr. 267, &c. Bachelor v. Bean, 2 Vern. 261. Blackmore v. Ley, 1 Eq. Abr. 60. S. C. Prec. in Ch. Semble, contra Gilpin v. Smith, 1 Ch. Ca. 82; but that case is overruled in Heard v. Lord

Stamford, 3 P. Wms. 411; and see Epwell v. Hassey, 1 P. Wms. 651, and Paget v. Hoskins, Prec. Ch. 431. Sturt v. Harvey, Mentioned 1 Sch. & Lefr. 271.

(p) Powell v. Bell, 1 Eq. Abr. 61. S. C. Prec. in Chan. 256.

(q) See Kennedy v. Daly, 1 Sch. & Lefr. 379, affirmed on rehearing, 2 Schr. & Lefr. 740; and see the case put by Lord Keeper in Bovey and Smith, 1 Vern. 149. S. C. 2 Ch. Ca. 124. This case was reversed in the House of Lords. See Martin v. Martin, Vin. Abr. title Fraud, A. (pl. 12.) noticed by Lord Redisdale in Kennedy v. Daly, ut supra.

(r) Gilb. Ch. 62.

(s) ; but wherever a Person comes in by a Title opposite to the Title by a Trust-Estate, or comes in under the Title to the Trust-Estate, for a valuable consideration, without fraud, or notice of fraud, or of the Trust, a Fine and Nonclaim may be set up as a bar to a claim of the Trust (t). If a Trustee conveys to a Person with notice, and takes a Re-conveyance, it is inoperative ; and if even the Person to whom he conveyed had no notice, yet on the Re-conveyance the Trust would attach, though it did not attach on the Person to whom he conveyed, nor would have attached if that Person had conveyed to another without notice (u). So, in like manner, by the Common Law, if a Disseisor aliens, and the Alienee dies seised, the entry of the 128*] Disseissee is barred ; but if the Land come again to *the Disseisor, the entry of the Disseissee is revived. So in regard to Goods, if a Trespasser of Goods sell them in Market overt, the Owner's title is barred, but he may seize them if they come to the Trespasser again (x).

It is not clear how far a Purchaser may be affected by a constructive, or doubtful Trust (y).

A Trust-Estate will pass under a general Devise by the Trustee ; but the Devisee takes the Land, subject to the original Trust (z). If the Devise for the Trustee is for purposes, or under Limitations, inconsistent with the idea that the Trust-Estate was intended to pass, it will not pass (a).

If A. devises Lands to B. on condition to pay C. a sum of Money, and there is no clause of entry, this is no charge on the Estate to give the Legatee of the Money a Lien on the Lands, though the Heir at Law may enter and take advantage of the condition ; but in Equity he is considered only as a Trustee for the Legatee (b).

Where a Vendor conveys his Estate to the Vendee, without receiving all or part of the Consideration-Money, he has, as against the Vendee and his Heir (c), and all Persons claiming as volunteers, or Purchasers for a valuable consideration, with 129*] *notice (d), a Lien upon the Estate, for the whole, or such part of the Purchase-money, as was not paid (e), and this, though

(s) 1 Sh. & Lefr. 380. Story v. Windsor, 2 Atk. 631, contra 2 Freem. 21, 69.

(t) Gilb. Ch. 63.

(u) 1 Sch. & Lefr. 379 ; and see Bovey v. Smith, 1 Vern. 60. S. C. 2 Ch. Ca. 126. Lowther v. Carlton, 2 Atk. 242, and the cases cited in the note by Mr. Sanders.

(x) Bovey v. Smith, 2 Ch. Ca. 126.

(y) See 1 vol. Sanders on Uses, 256, last edit. and the following cases there cited Warwick v. Warwick, 3 Atk. 293. Stenhouse v. Earl, Ambl. 285. Cordwell v. Mackrill, Ambl. 515. (S. C. 2 Eden 344). Hardy v. Reeves,

5 Ves. 426. Parker v. Brooke, 9 Ves. 583.

(z) Braybroke v. Inskipp, 8 Ves. 417.

(a) Attorney-General v. Buller, 5 Ves. 339. Ex parte Brettell, 6 Ves. 577.

(b) Wigg v. Wigg, 1 Atk. 393 ; and see Avelyn v. Ward, 1 Ves. 413.

(c) See Hughes v. Kearney, 1 Sch. & Lefr. 135.

(d) See on this subject Hennard v. Moore, 1 Eden, 327.

(e) Chapman v. Tanner, 1 Vern. 267. Walker v. Preswick, 2 Ves. 622

the consideration is upon the face of the Instrument Expressed to be paid, and a receipt indorsed (*f*). Nor does the Bankruptcy of the Vendee (*g*), nor a Judgment obtained against him by the Vendor for the Purchase-money (*h*), affect this Lien of the Vendor. And on the other hand, if the Purchaser of an Estate prematurely pays the Purchase-money before the Estate is conveyed to him, the Money will be considered as a Lien on the Estate in the hands of the Vendor for the Vendee, or in case of his death, for his personal Representatives (*i*). So, if no Conveyance is made, for want of a Title, the Purchaser has a Lien on the Estate for the Money he has advanced (*k*).

In one case, where Lands were sold, but not paid for, and the Vendee died, and the Vendee was Heir and Executor of the Vendee, he was allowed to take the Land as Heir, and pay himself the consideration of the Purchase out of the Assets, and was not confined to his Lien on the real Estate, though by that means Legatees were left unpaid (*l*).

*The Lien, it seems, is confined merely to the Vendor [*130 and Vendee, and will not extend to a third person (*m*). This point has already been considered in regard to the marshalling of Assets (*n*). And in all these cases, if by the contract, or other circumstances, it is evident that a Lien by implication was not intended to be reserved, it cannot be insisted upon (*o*); as where a *special Security* is given for the Purchase-money, a pledge of Stock, for instance (*p*), or a Mortgage of another Estate of the Vendee (*q*); but the Rule seems to be, that another security taken, will only, according to circumstances, afford evidence that the Lien was not intended to be relied upon (*r*). Where one sold an Estate and took a Bond for the Consideration-money, it was held that the Vendor had no Lien against the Creditors of the Vendee for whose benefit the Estate had been assigned (*s*). So where a *Note* was taken for part of the Consideration-money, the Lien was held to be gone *pro tanto* (*t*); but if the Note is not relied on as a Security, it does not destroy

(*f*) *Coppin v. Coppin*, 2 P. Wms. 294; and see *Fawell v. Heelis*, Ambl. 726; S. C. 1 Dick. 485. *Cator v. Earl of Pembroke*, 1 Bro. C. C. 302. *Mackreth v. Symmons*, 15 Ves. 337, 349. S. C. MS.

(*g*) *Bowles v. Rogers*, 1 Cooke's Bank. law, 139, last edit. 2 Christian's Bank. Law, 390. *Cowel v. Simpson*, 16 Ves. 278. *Ex parte Peake*, 1 Madd. Rep. 346. *Chapman v. Tanner*, 1 Vern. 267; see what is said in this case in Ambl. 726. *Grant v. Mills*, 2 Ves. & Bea. 306.

(*h*) *Ex parte Lord Seaforth*, 19 Ves. 236. S. C. 1 Rose, 306.

(*i*) *Mackreth v. Symmons*, 15 Ves. 345. 1 Sch. & Lefr. 135.

(*k*) *Lacon v. Mertins*, 3 Atk. 1.

(*l*) *Coppin v. Coppin*, 2 P. Wms. 496.

(*m*) *Pollexfen v. Moore*, 3 Atk. 272.

(*n*) See ante.

(*o*) *Austen v. Halvey*, 6 Ves. 483. *Mackreth v. Symmons*, 15 Ves. 347.

(*p*) *Nairn v. Prowse*, 6 Ves. 752.

(*q*) *Ibid.* p 760.

(*r*) *Mackreth v. Symmons*, 15 Ves. 347. S. C. MS.

(*s*) *Fawell against Heelis*, Ambl. 725. S. C. 1 Dick. 485; and see what is said in *Davies v. Moreton*, 2 Ch. Ca. 12.

(*t*) *Bond v. Kent*, 2 Vern. 280. *Ex parte Loaring*, 2 Rose, 79.

the Lien ; and if *Bills* were given as part of the Purchase-money, drawn upon an Insolvent House, such *Bills* would not discharge the Lien, for they were taken, not as a Security, but as a mode of payment (*u*). What may be the effect of a Security, 131*] *properly so denominated, of a *third Person*, seems not to have been determined (*x*).

If *A.* purchases an Estate of *B.* without notice of *Rent-charges*, &c., and the Vendor covenants that there are no encumbrances, and the Purchase-money is laid out in the Funds, and *B.* afterwards sells the Dividends for his Life, secured by letter of Attorney to *C.* who has no notice, and then *A.* is evicted by the Grantee of the *Rent-charges*, he has no Lien on the Funds purchased as against *C.* (*y*).

We shall conclude the subject of *Trusts* with a few observations with respect to,

1. *Breaches of Trusts*.—2 *Allowances to Trustees* ; and 3, the *Removal of Trustees*.

I. It has been the constant habit of Courts of Equity to fix persons in the character of Trustees with the consequences of a breach of Trust (*z*), or to charge their Representatives, whether they derive benefit from the Breach of Trust, or not (*a*) ; and in such cases an Account will not, as in the case of a common Account, be confined to six years (*b*). And Lord Hardwicke seems to have thought, that those Courts have Jurisdiction over 132*] every breach of Trust, let the *person guilty of it be either in a *public*, or *private*, capacity (*d*).

Lord Hobart says, that a *Cestui que Trutt* may bring an Action on the Case against his Trustee, and recover for a breach of Trust, in Damages, and Lord Jeffreys appears to have countenanced that Doctrine (*e*), but that would be to give a Court of Law a degree of Jurisdiction in cases of *Trusts* which it has always anxiously declined ; and, indeed, Lord Ch. J. North, in a case in the Exchequer Chamber (*f*) observed in contradiction of Hobart, " That no Action on the Case will lie for a breach of Trust, because the determination of the principal thing, viz. the

(*u*) Hughes v. Kearney, 1 Sch. & Lefr. 136. Grant v. Mills, 2 Ves. & Bea. 309. Gibbons v. Baddal, 2 Eq. Ca. Abr. 682. Ex parte Peake, 1 Madd. 346 ; and see on this subject Sugd. Vend. & Purch. 461, &c. edit. 5, and the cases there mentioned.

(*z*) Grant v. Mills, 2 Ves. & Bea. 309.

(*y*) Cator v. Earl of Pembroke, 1 Bro. C. C. 301, and 2 Bro. C. C. 282.

(*x*) Vernon v. Vandry, Barnard, 303.

(*a*) Adair v. Shaw, 1 Sch. and Lefr. 272. Lord Montford v. Lord Cadogan, 17 Ves. 489.

(*b*) Attorney-General v. Brewers Company, 1 Meriv. 498.

(*d*) The Charitable Corporation v. Sutton, 2 Atk. 406. Lonsdale v. Church 3 Bro. C. C. 41.

(*e*) Jevon v. Bush, 1 Vern. 344 ; and see 1 Eq. Abr. 384. (D) note (*a*.)

(*f*) Barnardiston v. Soame, 7 vol. State Trials, 443, edit. by Hargr.

Trust, does not belong to the Common Law, but to the Court of Chancery."

A breach of Trust is considered but as a simple contract Debt, and can only fall upon the personal Estate of a Trustee (*g*), unless, perhaps, where the Trustee is a Trader at his death, within the meaning of the Bankrupt Law (*i*), or has acknowledged the Debt to the Trust-Estate under Hand and Seal (*k*); and the particular circumstances of a case, will not vary the Rule (*l*).

Executors are placed in a very responsible situation, and are often involved in questions relative to a breach of their Trust. It is easy, however, for persons* named Executors to put [*133 themselves out of all difficulty by declining to act. No Man has a right to make another an Executor without his consent (*l*); and even if in the Life-time of the Testator he has agreed to accept the office, it is still in his power to recede, except so far as his feelings may forbid it; and it will be proper for him to do so, if he finds that his charge as Executor will be different from what he conceived it was to be, when he entered into the engagement (*m*). He must either wholly renounce, or if he acts to a certain extent as Executor, and takes upon himself that character, he can be discharged only by administering the effects themselves, or by putting the Administration into the hands of a Court of Equity (*n*).

In one case it was held, that if an Executor has administered, though without proving the Will, a renunciation afterwards is void, and he will be charged with all the subsequent Receipts of his Co-executor (*o*); but in a more recent Case it was considered as clear, that an Executor may join in the Probate with his Co-executor, and does not by that, and by permitting the other Executor to possess Assets, make himself answerable for the Receipts of the other (*p*).

If an Executor has not proved, he is not considered as acting by assisting a Co-executor who had proved, in writing letters to collect Debts; nor by writing *directly to a Debtor of [*134 the Testator, and requiring payment (*q*).

Two principles appear to have been adopted in regard to the liability of Executors, who, it must be remembered, are considered as *Trustees*: 1st. that with a view not to deter persons from undertaking a Trust, the Court is extremely liberal, and

(*g*) *Vernon v. Vawdry*, 2 Atk. 119. Master of the Rolls, Executors, but 8 C. Barn. 290. *Cox v. Bateman*, they declined acting.
2 Ves. 19. *Kiernan v. Fitzsimon*, 3 (*m*) *Doyle v. Blake*, 2 Sch. & Lefr. 239.

(*i*) 47 Geo. 3. Sess. 2 c. 74.

(*k*) *Gifford v. Manley*, For. 109.

(*l*) 2 Atk. 119.

(*l*) There is a case, somewhere in the Books, in which it appears, a Person appointed the Lord Keeper Bacon, Chief Just. Catlin, and the

(*n*) *Ibid*. 245.

(*o*) *Read v. Truelove*, Ambl. 417.

(*p*) *Hovey v. Blakeman*, 4 Ves. 607; and see *Balchen v. Scott*, 2 Ves. jun 678.

(*q*) *Orr v. Newton*, 2 Cox, 274.

will so determine, as not to strike a terror into mankind, acting for the benefit of others, and not for their own (r) ; and will endeavour to deliver a Trustee from any mischief that may happen from a misapplication of Trust-money (s) ; and where Executors intend fairly to discharge their duty the Court will not hold them liable upon slight grounds (t). (1) 2dly, That care must be had to guard against an abuse of their Trust (u).

The question, whether an Executor shall be charged with Interest on the Assets retained in his hands, turns on this ; viz. whether the Fund has been so kept for any other purpose than that of discharging the growing claims upon it. It frequently may be necessary for an Executor to keep very large sums in his hands, (2) especially in the course of the first year after the decease of his Testator, in which case such necessity is so fully acknowledged, that according to the constant course of the Court, the Fund is not distributable till after that time. After that, if the Court observes that an Executor keeps money in his 135*] hands without any apparent reason, *but merely for the purpose of using it, then it becomes negligence and a breach of Trust ; the consequence of which is, that the Court will charge the Executor with Interest, and usually at four-per-cent., but that is only in cases where it does not appear that the Executor has actually made Interest of it, or what rate of interest has been so made ; for if it can be made distinctly to appear that a greater rate of Interest than four-per-cent. has been actually made by the Executor, the Court will not let him derive any benefit to himself, but he is accountable according to the rate of Interest he has made. (3) It has very frequently happened, that from the manner in which the Fund has been used it is totally impossible to tell what Interest has been made of it ; and it has been long decided, that four-per-cent. is the proper rate to be charged under those circumstances ; the propriety of that Rule has been doubted, but it is now the constant course (x).

(r) See *Ambl. 219. Powell v. Evans*, 5 Ves. 843.

(s) *Trafford v. Boehm*, 3 Atk. 444.

(t) *Powell v. Evans*, 5 Ves. 843.

(u) See *Raphael v. Boehm*, 13 Ves. 410; and see *S. C. 13 Ves. 591. S. C. MS.*

(x) *Forbes v. Ross*, 2 Cox, 115,

16; and see *Tebbs v. Carpenter*, 1 Madd. Rep. 290. In *Mosely v. Ward*, 11 Ves. 581, it is laid down as a Rule, that wherever there has been a general dereliction of duty by an Executor keeping Funds in his hands, he will be charged with five-per-cent. interest, and pay costs ; see *quæ.*

(1) Vide *Hart v. Ten Eyck*, 2 Johns. Ch. Rep. 76. *Thompson v. Brown*, 4 Johns. Ch. Rep. 619.

(2) Vide *Darrel v. Eden*, 3 Des. 241.

(3) Vide *Darrel v. Eden*, *ut supra*.

Trustees are chargeable with interest, if they have used the trust funds, or have been negligent either in not paying over the money, or not putting it at interest. *Duncomb v. Duncomb*, 1 Johns. Ch. Rep. 508. *Manning v. Manning*, 1 Johns. Ch. Rep. 527. *Schieffelin v. Stewart*, 1 Johns. Ch. Rep. 620. *Mumford v. Murray*, 6 Johns. Ch. Rep. 1,452. *Brown v. Rickets*, 4 Johns. Ch. Rep. 303.

It seems, in general, that where an Executor is decreed to account, *annual Rests* are not made (y). (1) But where, under a Will, an Executor was directed not to derive any advantage from keeping Money in his hands without accounting for legal Interest, and to accumulate for *Cestui que Trust*, it was, on a Bill for that purpose, decreed, that a Computation should be made of Interest at five-per-cent. on all *Sums received [*136 by him while in his hands ; and the Master should in such Computation, make half-yearly Rests (z) (2) If an Executor who is under such a direction to accumulate becomes a Bankrupt, his Estate is chargeable as in Equity, with Interest, at five-per-cent., with Rests (a).

It has been held, that an Executor may make use of Money which is perpetually coming in by Assets of the Testator, and turn it to his own advantage ; and that it is not improper for an Executor to do it upon his own account where he is a responsible Man, and ready to answer Legacies and Debts when called upon (b) ; but the more modern Doctrine appears to be, that when a Trustee has made use of the Trust Fund he may be compelled by the *Cestui que Trust* either to replace the Fund, with Interest, or account for the advantage he has made of it, as it should appear most for the benefit of the *Cestui que Trust* (c) ; (3) and this, whether the Trust be *public* (d) or *private*.

Where an Executor appears to have made five-per-cent. of the Assets in his hands, or where he has by the non-application of Assets done damage to the Estate to the amount of five-per-cent. in either case he is chargeable with Interest at that rate. Where, therefore, he permits Debts carrying Interest at five-per-cent. to run on when he had in his hands a Fund to pay them, he must, *ex ratione*, pay Interest*at that rate ; but [*137 where it appears only that the Executor retained the Assets for his own purposes, he must answer for Interest at four-per-cent. (e).

(y) *Robinson v. Cumming*, 2 Atk. 410.

(z) *Raphael v. Boehm*, 11 Ves. 92. confirmed on a rehearing by Lord Erskine, 13 Ves. 407; and S. C. MS.

(a) *Dornford v. Dornford*, 12 Ves. 127.

(b) *Adams v. Gale*, 2 Atk. 106.

(c) *Ex parte Shakeshaft*, 3 Bro. C. C. 198; and see *Brown v. Litton*, 1 P. Wms. 140. S. C. 10 Mod. 20. *Massey v. Davis*, 2 Ves. jun. 320. *Watson Ex parte 2 Ves. & Bea.* 415.

(d) See *Lonsdale v. Church*, 3 Bro. C. C. 41.

(e) *Hall v. Hallet*, 1 Cox, 134.

(1) Vide *Darrel v. Eden*, *ut supra*.

(2) Compound interest is not allowed in favour of an executor or trustee, though it may be permitted against him, when he refuses to disclose the profits made out of the trust estate. *Evertson v. Tuppen*, 5 Johns Ch. Rep. 497.

And so, if a trustee converts the trust money to his own use, or employs it in trade or business, he is chargeable with compound interest. *Schieffelin v. Stewart*, 1 Johns. Ch. Rep. 620.

(3) Vide *Darrel v. Eden*, 3 Des. 242.

A Testator directed his Executors to lay out the residue of his Estate in Purchase of Lands, or upon heritable or personal Securities, at such rate of Interest as they should think reasonable. The Executors lent the Fund to one of themselves on Bond at four-per-cent., when five-per-cent. might have been made by heritable or Government Securities. The discretion given by the Will to the Executors, might, it was held, have been soundly exercised by their lending the Money to any other person upon such terms as they thought reasonable; but a Trustee contracting with himself cannot spare himself; and he must therefore pay Interest at five-per-cent. for the Money in his hands (*f*).

In other Cases, Executors have, under circumstances, been directed to pay Interest on balances in their hands, and Costs (*g*).

The Court will not permit an Executor to keep his Testator's Money dead in hands, especially if empowered to lay it out at Interest (*h*); if kept to answer the exigencies of the Testator's affairs it is excusable (*i*); but outstanding demands, even on probable grounds, are no reason why the Executors should not lay their Testator's Money out. If laid out in the three-per-138*] cents. or reduced Bank *Annuities, the Court would affirm their Act (*k*); nor would they be liable in case of a fall of Stock (*l*).

If a Trustee lays out Trust-Money in a Fund which the Court does not adopt, (the Fund it adopts is the three-percents.) and it afterwards sinks in its value, this Court, though there were no *mala fides*, will throw the loss upon the Trustee, but if not laid out in the Fund which the Court adopts (*m*).; if any profit arises from the purchase in the Funds, it belongs to the *Cestui que Trust* (*n*).

A Testator in India bequeathed a sum of Sicca Rupees to his Wife, for Life, with Remainder to his Children, and appointed his Wife Executrix. who invested the Money on Indian Securities, producing a large rate of Interest, and afterwards came to England, with her only Child, an Infant. On a Bill filed by the Infant it was held, that the Widow was not compellable to refund the excess of Interest received by her beyond what the Legacy would have produced if invested in the English Funds, but ordered the Money to be remitted to England, and laid out in three per cent. Annuities (*o*).

If an Executor lays out the Assets on private Securities, all

(*f*) Forbes v. Ross, 2 Cox, 113.

(*g*) Ashburnham v. Thompson, 13 Ves. 402. S. C. MS.

(*h*) Lucas Rep. 141.

(*i*) See Littlehales against Gascoigne, 3 Bro. C. C. 74.

(*k*) 16 Ves. 111. 7 Ves. 137.

(*l*) Franklin v. Smith, 3 Bro. C. C.

434. Jackson v. Jackson, 1 Atk. 513.

(*m*) Hancorn v. Allen, 1 Dick. 498.

(*n*) Phayre v. Perce, Dom. Proc. 3 Dow, 128.

(*o*) Holland v. Hughes, 3 Meriv. 685.

the benefit made thereby, accrues to the Estate, but the Executor is answerable in case of a deficiency (*p*) ; more especially in the case of Infants (*q*).

*By the *Common Law*, when the Executor wastes, his Ex- [*139 ecutor is not liable, because it is a personal wrong, but it is otherwise in Equity ; and, says *Lord Nottingham*, (though in this he has not been a true prophet,) “ the *Common Law* will come to it at last” (*r*).

If an Executor changes and alters the Nature of a Testator's Estate, it has been insisted that this is a Conversion by the Executor, and that as Money has no ear-mark, it cannot be followed, but the Executor by such transaction makes himself liable to a *devastavit*, and, in general, this is the rule (*s*) ; but it seems, that if an Executor, *for the benefit of the Testator's Estate*, should invest part of it in the Funds, or should transfer the Money from one particular Stock, and invest it in another, this is not a conversion, or appropriation by the Executor of the Testator's Estate, but it might still be followed as much as if it had continued in the same plight or condition as it stood in at the death of Testator (*t*).

Payment by an Executor of a *simple contract Debt*, before a breach of the Condition of a Bond entered into by his Testator, is good, and no *devastavit* (*u*) ; but payment of *Legacies*, it seems, under such circumstances, would be a *devastavit* (*x*), and therefore where a Bill was filed for an Account, by a *residuary Legatee* against an Executor, it was holden he was *entitled to an indemnity to protect himself against a future contingent demand in respect of Covenants entered into by the Testator for payment of Rent, and Repairs of an Estate held by him under a Lease from a Corporation, though there was no existing breach of Covenant, nor any arrears of Rent, in respect of which he was liable (*y*).

If an Executor wastes the Fund appointed for younger Children's Portions, it is a *devastavit* in him, for which he is accountable ; but the younger Children have no remedy over out of the real Estate (*z*). So if Lands be settled or devised for the payment of Debts, the Land is discharged as soon as the Money is raised, though misapplied by the Trustees (*a*).

If a specific Legacy is given to an Executor, who afterwards becomes Bankrupt and commits a *devastavit*, and his Assignees

(*p*) *Adye v. Feuilletian*, 1 Cox, 24.

(*q*) *Holmes v. Dring*, 2 Cox, 1.

(*r*) *Price v. Morgan*, 2 Ch. Ca. 217.

(*s*) See what is said in *Vullamy v. Noble*, 3 Meriv. 616.

(*t*) *Child v. Gibson*, 2 Atk. 603.

Waste v. Whorwood, 2 Atk. 159 ; and

see *Worsely v. Earl of Scarborough*, 3 Atk. 322.

(*u*) *Hawkins v. Day*, Amb. 160.

(*x*) *Ibid* 162.

(*y*) *Simmons v. Bolland*, 3 Mer. 347.

(*z*) *Morgan v. Morgan*, Dom. Proc. 21 April 1735 ; and see *Salk*. 155. 1

Vern. 336. *Prec. Ch.* 397, 439, 585.

(*a*) *Anon*. 1 *Salk*. 153.

sell the subject of the specific Bequest, the produce in their hands is not liable to make good the *devastavit*; all the remedy of the persons injured by the *devastavit* is to prove the amount under the Commission (b).

A Trustee ought strictly to pursue the tenor of his Trust, without perverting it, directly or indirectly, to his own personal advantage (c).

If a Trustee sells out Stock improperly, he will be decreed to replace it; and if Stock be at a less price than when sold out, 141*] to invest the Surplus in *the same Stock to the same uses (d), or the *Cestui que Trust* may elect to have the Money for which the Stock sold (e).

If a Gentleman permits a Steward to make use of Money in his hands, he cannot call upon him for the intermediate Interest (f), for that, it seems, is not considered a breach of Trust.

If a Trustee suffers his Co Trustee to detain a sum of Money, belonging to the Trust Estate, they are both liable (g).

An Administrator *pendente lite* is not answerable for Interest in respect of a Balance in his Hands during the pendency of a Suit in the Ecclesiastical Court (h).

At Law, if a Trustee join in a Receipt, he will be charged with the Fund, because he appeared to have a power over it (i); but in Equity the Rule is different, for if two Trustees join in Receipts or Conveyances, and one of them only receives the Money, that party is solely liable, as the other joined purely for the sake of conformity (k); (l) and this, though there are not negative words in the Deed creating the Trust, as that "they shall not be liable for the acts of one another (l);" but if the sale of 142*] the Estate was unnecessary, the Trustee would be *liable (m). If however the *Cestui que Trust* has notice of the breach of Trust, and acquiesces, then it seems the Trustee is not chargeable (n).

It has been said, that the rule that Trustees shall not be accountable for losses which happen from necessary acts, does not hold as to persons employed by the Trustees, but only to

(b) Geary v. Reaumont and others, 3 Meriv. 431.

(c) Richardson v. Chapman, 7 Bro. P. C. 324. Toml. edit.

(d) Earl Powlet v. Herbert, 1 Ves. jun. 297.

(e) Harrison v. Harrison, 2 Atk. 121.

(f) Lonsdale v. Church, 2 Ves. jun. 44.

(g) Keble v. Thompson, 3 Bro. C. C. 112.

(h) Gallivan v. Evans, 1 Ball & Beatty 191.

(i) Townley v. Challoner, Cro. Car. 312. S. C. Bridgman, 35.

(k) Saddler v. Hobbs 2 Bro. C. C. 117. Scurfield against Howes, 3 Bro. C. C. 94. Fellows v. Mitchel, 1 P. Wms. 81. S. C. 2 Vern. 504, 515.

(l) Brice v. Stokes, 11 Ves. 324; but see Spalding v. Shalmer, 1 Vern. 303.

(m) Leigh v. Barry, 3 Atk. 584.

(n) Brice v. Stokes, 11 Ves. 319.

(o) Ib. and rule approved in Langford v. Gascoyne, 11 Ves. 336; and see Trafford v. Boehm, 3 Atk. 444.

the Trustees themselves (o) ; but it has since been determined, that where Trustees act by other hands, either from necessity, or conformable to the common usage of mankind, they are not answerable for losses (p). If a Trustee appoints Rents to be paid to a Banker, who fails (q), or is robbed (r), the Trustee is not answerable. If, however, a Receiver, (s), or the Agent of a Trustee, pays Money into his Banker's hands, *misusing it as his own Money*, and the Banker fails, such Receiver or Agent, it seems, would be liable (t).

If the Testator's Banker fail with Monies in his hands the Executor is not liable (u).

If a Trustee trusts an Attorney, he must abide by the effect of that confidence (x).

If Money lent by Trustees, and which they were authorized to lend, be in danger, it should be called in (y, z).

*If Trustees are empowered to cut Timber, to pay Debts, and they cut a great deal more than is necessary. This is an abuse of Trust, and the produce will go according to the Settlement of the Estate (t).

Where an Executor, or Trustee, instead of executing the Trust, as he should, by laying out the property in well-secured real Estates, or upon Government Securities, takes upon him to dispose of it in another manner, the *Cestui que Trust* may call him to an account, either way, having an option to make him replace it, or if it is for their benefit to affirm his conduct, and take what he has sold it for, they may take that, and charge him with five-per-cent. Interest; or if he has made more, they may charge him with that (u). But if there has been an embezzlement of the Money, but a mere neglect to pay, he is only charged with four-per-cent. Interest, and Costs; if he wastes the Fund with his own Money at his Banker's, he is chargeable with

(o) *Ex parte John De Saumarez*, 1 Atk. 87.

(p) *Belchier v. Parsons*, Amb. 219.

(q) *Belchier v. Parsons*, Amb. 219. 3 Atk. 489.

(r) *Jones v. Lewis*, 2 Ves. 241.

(s) *Wren v. Kirton*, 11 Ves. 371.

(t) *Masey v. Banner*, 4 Madd. Rep. and the cases there mentioned, contra *Adams v. Claxton* 6 Ves. 226.

(u) *Rowth v. Howell*, 3 Ves. 366.

(x) *Chambers v. Minchin*, 7 Ves. 196. See *vid.* *Jones v. Lewis*, 10 Ves. 240.

(y) *Payne v. Colles*, 1 Ves. jun. 172.

(z) *Tully v. Tully*, mentioned 3 Ves. 372.

(u) See *Treves against Townsend*, 1 Bro. Eld. *Boswell v. Boswell*, 2 Bro. C. C. 632. *Perrich v. Kensington*, 5 Ves. 754. and *Long v. Stewart*, ib. in note to p. 356. *Perry and others*, 5 Ves. 625. *Newson and Bennett*, 1 Bro. C. C. 23.

(x) *Recke v. Hart*, 11 Ves. 6. *Treves v. Townsend*, 1 Cr. 21.

(1) And so, where the responsibility of a trustee or guardian, or that of an executor, becomes doubtful, the court will order the monies to be brought into court, to be put at interest for the benefit of the parties interested, or that further and adequate security be given. *Mitchell v. Mitchell*, 5 Jones. Ch. Rep. 283. *Vide* *Elmhurst v. Lanning*, 4 Jones Ch. Rep. 32.

four-per-cent. (y), and perhaps more (z); but an Executor is not chargeable with Interest for a balance in his hands, retained under a misapprehension of his right to it (a).

A Trustee is only answerable for Fraud, or such a gross neglect as is equal to Fraud; and therefore, where Trust-money is suffered by a Trustee to remain in the Hands of A. with the 144*] privity, and *approbation of the parties beneficially interested, instead of laying it out in a Purchase, pursuant to Marriage Articles, and A. becomes insolvent, the Trustee is not in such case answerable (b).

Where a Trustee represented that Money was invested in Stock, though in truth it was not, he was charged upon the same principle as if he had sold out Stock and used the Money (c).

Though no *Fraud* is imputed to Trustees, and no kind of interest or benefit to themselves, in their negligence, they are, nevertheless, answerable (1). If it were otherwise, it would be an encouragement to bad motives, and it might be impossible to detect undue motives (d); but the *Lord Keeper North* said it must be a very supine negligence to render a Trustee liable (e) (2).

(y) *Ferkins v. Baynton*, 1 Bro. C. C. 375.

(z) See *Ex parte Hilliard*, 1 Ves. jun. 90. *Treves v. Townshend*, 1 Bro. C. C. 385. S. C. 1 Cox, 50, and *Rocke v. Hart*, 11 Ves. 61.

(a) *Bruyere v. Pemberton*, 12 Ves. 386.

(b) *Allen v. Hancorn*, 7 Bro. P. C. 375, Toml. edit.

(c) *Bate v. Scales*, 12 Ves. 402.

(d) *Caffrey v. Darby*, 6 Ves. 495, 6.

(e) *Palmer v. Jones*, 1 Vern. 144.

(1) Where a person receives bonds and notes as collateral security for a debt, he is bound to use due diligence, and if the security is lost through his negligence, by the insolvency of the obligors, &c. he is chargeable with the amount. *Barrow v. Rhineland*, 3 Johns. Ch. Rep. 614.

If a trustee lends the money of the *cestui que trust*, without due security, he will be responsible for any loss which may happen, in consequence of his negligence. But what shall be deemed due security, in such case, seems not to be precisely settled. It seems, however, in general, that mere personal security is not sufficient to justify the trustee. But where a guardian took promissory notes of persons solvent at the time, and who continued so at the time of taking the account before the master, under a decretal order of the court, on a bill filed for an account, and which notes were allowed and credited to the guardian, and were ready to be delivered up by him, the notes being for small sums, for rents, &c. and the credit and course of the business, being according to the practice of the testator, in his life time, it was held, that the guardian was not responsible for the loss. *Smith v. Smith*, 4 Johns. Ch. Rep. 281.

So, where a trustee is directed to sell, on giving public notice, a sale, without such notice, will confer a valid title on the purchaser; but the trustee will be responsible for any deficiency of price, below the real value of the land, at the time of sale. *Minuse v. Cox*, 5 Johns. Ch. Rep. 441.

A sale by a trustee will be supported, if it be made *bona fide*, and for a valuable consideration, and there be no supine negligence on his part; for he is not required to act with the utmost possible degree of care. *Franklin v. Osgood*, on appeal, 14 Johns. Rep. 527.

(2) If an executor or trustee be robbed of the trust money, he will not be accountable for it. *Furman v. Coe*, 1 Caines' Cas. in Error, 96.

Where one *Executor* receives the whole or part of the Testator's Estate, and pays it over voluntarily, and unnecessarily, to his Co-executor, and the same is embezzled or lost, he who so paid it over is answerable with the other (*f*), unless he can assign a sufficient excuse (*g*); but it seems he is not answerable where he is merely *passive*, by not obstructing the other in receiving it (*h*), and does not himself concur in the application of it (*i*).

*If an *Executor* living in *London* is to pay Debts in [*145 *Suffolk*, and remits Money to his Co-executor to pay these Debts, he is considered as doing this of necessity, and he is not to be responsible for a misapplication (*k*). It would be the same, were one *Executor* in *India* and another in *England*; the Assets being in *India*, but to be applied in *England*, the *Executor* in *India* would not be responsible if he remits to the *Executor* in *England* (*l*).

It has been held, that if two *Executors* join in Receipts and Conveyances, and one only receives the Money, yet both are liable to Creditors (*m*) (*1*), and, it seems, to Legatees (*n*), because it is not necessary for conformity that all the *Executors* should join in giving a Receipt, as it is in the Case of Trustees (*o*). And where one of two *Executors* and Trustees, who had not acted otherwise than by joining with his Co-executor and Trustee in the Sale of Stock, under a misrepresentation that the Sale was necessary for payment of Debts, the produce having

(*f*) *Townshend v. Barber*, 1 Dick. 356. *Gill v. Attorney-General*, Hard. 314. *Sadler v. Hobbs*, 2 Bro. C. C. 114. *Chambers v. Minchin*, 7 Ves. 186; and see *French v. Hobson*, 9 Ves. 103. *Loggan v. Bull*, before Vice-Chanc. Plumer, on exceptions to Master's Report, 31st July 1815.

(*g*) As in *Bacon v. Bacon*, 5 Ves. 331, approved 7 Ves 193. *Lord Shipbrooke v. Lord Hinchinbrooke*, 11 Ves. 252. 16 Ves. 478.

(*h*) *Langford v. Gascoyne*, 11 Ves. 335.

(*i*) *Hovey v. Blakeman*, 4 Ves. 607.

(*k*) See *Joy v. Campbell*, 1 Sch. & Lefr. 341, affirmed on rehearing, 2 Sch. & Lefr. 740.

(*l*) *Ibid.* 342.

(*m*) *Sadler against Hobbs*, 2 Bro. C.

C. 117. *Brice v. Stokes*, 11 Ves. 324, 5. *Chambers v. Minchin*, 7 Ves. 198; but see what is said in *Hovey v. Blakeman*, 4 Ves. 608, and in *Westly and Clarke*, 2 vol. Dick. 329. 1 Eden, 357, and S. C. mentioned in note to 1 P. Wms. 83; see also *Harden v. Clarke*, *ibid.* 148, and *Joy v. Campbell*, 1 Sch. & Lefr. 341, affirmed on rehearing, 2 Sch. & Lefr. 740. *Doyle v. Blake*, 2 Sch. & Lefr. 242.

(*n*) See note (2) to *Churchill v. Lady Hobson*, 1 P. Wms. 241.

(*o*) See *Wesley and Clarke*, mentioned in note to 1 P. Wms. 83, and 1 Dick. 330, and see the observations on that case in *Doyle v. Blake*, 2 Sch. & Lefr. 243. *Leigh v. Barry*, 3 Atk. 584. *Belchier against Parsons*, Amb. 219.

(1) Where two executors or trustees, join in a receipt for money, the presumption is strong that the money came equally into the hands, or under the control of both; and consequently, both are liable: But it seems, that the presumption may be rebutted by direct proof. *Monell v. Monell*, 5 Johns. Ch. Rep. 283. So, if by any act or agreement of one executor or trustee, money comes into the hands of his co-executor or co-trustee, both are accountable for it. 1b.

been received by the latter, and the greater part applied by him 146*] to his own private *purposes, was held chargeable for the amount (1), except so far as any part was applied to Trust-purposes, together with Interest at four-per-cent, notwithstanding the parties beneficially interested consented to and approved of the Sale under a similar representation; for though they consented to the Sale, they did not to the *misapplication* (o).

Executors are not justified in laying out Money on *personal Security* (p) (2); and though Trustees were expressly empowered to lend the Trust-money on real or personal Security, it was held they were not justified in lending it upon Bond to a trader (q); they must in such cases, take the best Security (r), nor can they, without great reason, permit Debts due upon personal Security to remain longer than is absolutely necessary, especially where *Infants* are concerned (s). If they neglect to call in Money due on Bond, they will be liable (t).

Though an Executor may invest Money in *real Securities*, he will yet be liable in case of a Loss, if there was ground at the time to suspect it (u), or it was not the best price that could be obtained (x).

Where Trustees are empowered to invest Money, until a purchase of Lands can be found, in *Government** Funds, or other *good Securities*, this, it has been held, does not warrant them in laying out the Money in *South Sea Stock*, or in *Bank Stock*, for by so doing losses may be occasioned; but they are justified in laying it out in *South Sea Annuities*, and *Bank Annuities* (y).

It has been held, that as Money has no ear-mark, if a Receiver of Rents lays out the Money in the purchase of Land, or if an Executor should realize all his Testator's Assets, and afterwards die insolvent, a Court of Equity cannot follow the Land, unless where the Party has by *Deed* owned the receipt of the Money, and that he has laid out the same in the purchase of Lands, as that would amount to a declaration of Trust, and raise

(o) *Underwood v. Stevens*, 1 Meriv. 723.

(p) *Wilkes v. Steward*, Coop. 6. The doctrine in *Harden v. Parsons*, 1 Eden, 145, has not been followed.

(q) *Langston v. Olivant*, Coop. 33.

(r) *De Manneville v. Crompton*, 1 Ves. & Bea. 359.

(s) *Powell v. Evans*, 5 Ves. 844.

(t) *Lowson v. Copeland*, 5 Ves.

156. S. C. 2 Bro. 156, but called an extraordinary case in *Ord v. Newton*, 2 Cox, 276. *Powell v. Evans*, 5 Ves. 839, and see *De Manneville v. Crompton*, 1 Ves. & Bea. 359.

(u) *Brown v. Litton*, 1 P. Wms. 140.

(x) *Wilkes v. Steward*, Coop. 8.

(y) *Trafford v. Boehm*, 3 Atk. 44.

(1) But where one executor or trustee joins in the receipt from mere necessity or formality, and he can shew, that the money, in fact, came into the possession of his co-executor, without his knowledge or consent, and that it was not in his power to control or secure the money, he will not be held accountable for it. *Monell v. Monell*, *ut supra*.

(2) Vide *Smith v. Smith*, 4 Johns. Ch. Rep. 281.

a specific Lien upon those Estates (z). But whatever doubts may have been formerly entertained upon this subject, it seems now settled, that Trust-money may be followed into Land in which it is vested, and a claim of this sort may be supported by parol evidence (a); and if the fact, that the Assets had been realized, is admitted by the Answer of the Executor, relief has been given, and if admitted by the Representative of the Executor, though such admission does not bind the Heir, it lays a ground for an Inquiry (b); but if a Trustee for the purchase of Land buys Land, it will not be liable to the Trust, if there are circumstances *affording a strong presumption that the [*148 Land was not purchased in the execution of the Trust (c).

Lord Hardwicke appears to have thought that where a Sum of Money in Trust is already laid out upon a real Security, and afterwards the same is laid out by the Trustees upon another Estate, it is a very different case, and stands upon very different principles than where a Sum of Money is intended to continue as it is in the hands of Trustees and they lay out that Sum in the purchase of an Estate, because here the nature of the Property is altered, and it is become quite another thing; but in the former case the nature of the Property is the same, and continues unaltered, though it is transferred to another Estate (d).

If A. gives Legacies, and makes B. his Executor, and B. receives the Assets, and buys Land with the Money, and dies, the Court, on a Bill by Legatees, to be paid their Legacies out of B.'s real and personal Estate, will direct an Inquiry, whether part of the Assets were laid out in the purchase of an Estate, and if they were, declare that they ought to be restored to the Testator's personal Estate (e). In that case it was considered as a circumstance of weight, that B. had no means of making the purchase, except with the Trust-money (f).

*At Law, if the Trust-property be Money, and it is converted into any other *chattel*, that chattel or produce will belong to the *Cestui que Trust* (g), and the same rule prevails in Equity (h). Thus also, at Law, if A. be trusted by B. to purchase a Horse for him, and he purchases a Carriage with the Money, B., it seems, is entitled to the Carriage (i).

An Executor cannot renew a Lease for his own benefit, and the *Cestui que Trust* may have relief against him, or a Purchaser

(z) Deg v. Deg, 2 P. Wms. 414.

(a) Lench v. Lench, 10 Ves. 517.

(b) Vid. Ryal v. Ryal, 1 Atk. 58. S. C. noticed in Lane v. Dighton, Amb. 413. Bagnay v. Hamilton, Amb. 413.

(c) Perry v. Phelps, 4 Ves. 108, confirmed on a Bill of Review, 17 Ves. 173.

(d) Worsely v. Lord Scarborough, 3 Atk. 392. et vid. Ryal v. Ryal, 1 Atk. 59.

(e) Ryal v. Ryal, 1 Atk. 58. S. C. Amb. 413.

(f) See the observation of Sir Thomas Clarke, Amb. 413, and of the Master of the Rolls in Lench v. Lench, 10 Ves. 518.

(g) See Taylor v. Plumer, 3 Maul. & Selw. 478, 9.

(h) Liebman v. Harcourt, 2 Meriv. 131.

(i) 3 Maul. & Sel. 57b; and see Whitecomb v. Jacob, Salk. 160.

with notice (*l*). Indeed, whenever a Mortgagee, Executor, Trustee, or Tenant for Life (*m*), gets an advantage by either being in possession, or behind the back of the Party, Mortgagor, *Cestui que Trust*, or Remainder-man, he is not allowed to retain the same for his own benefit, but will be considered as holding it in *Trust* (*l*); the new Lease in any of those cases being considered as a graft upon the old one (*n*). Where a *Tenant-right Estate*, as it is called, is settled upon Marriage, the renewal is to the Uses of the Settlement (*o*).

[150*] The principle of these cases seems to have been *carried very far in *James v. Dean* (*p*). A Bequest was made of Leascholds for years determinable upon Lives, for Life, with Remainder over for all the residue of the term and Interest the Testator shall have to come therein at his decease. The Term expired in the Life of the Testator, who continued to hold, and paid half a Year's Rent before his death, as Tenant by the Year; and it was determined, that a subsequent Lease obtained by the Executrix, the Widow and Tenant for Life under the Will, should be held subject to the Uses of the Will, and as the Residue of the Term at his death, however short, would have been.

A Testator seised in Fee of a moiety of an Estate at *L.* and in possession of the other moiety as Tenant from year to year to St. Sohn's College, (his Lease from the College having expired) gave to his Wife, *durante viduate*, "all that his Mesuage or Tenement, with the Farm and Lands at *L.* and all his Estate and Interest therein, she paying the Rent reserved to St. John's College, &c." The Widow after his death obtained a new Lease, and subsequently purchased the Reversion of one to whom it had been conveyed by the College, under an Act of Parliament. It was held, that the renewed Lease was taken subject to the Trusts of the Will, and that those in Remainder must contribute in proportion to the Fine paid by the Widow; but that the purchase of the Reversion being not from the College, but from the Person to whom it had been conveyed by [151*] the College, was not subject to the Trusts of the Will (*q*).

(*l*) *Walley v. Walley*, 1 Vern. 484. Anon. 2 Ch. Ca. 207.

(*m*) As to Tenant for Life, see *Foster v. Marriott*, Ambl. 668. *Rowe v. Chichester*, Ambl. 715. and in note to 1 Bro. C. C. 198. *Owen v. Williams*, Ambl. 734, and in note to 1 Bro. C. C. 199. *Pickering v. Vowles*, 1 Bro. 197. *Randall v. Russell*, 3 Meriv. 196.

(*n*) *Nesbit v. Treddennick*, Ball & Bea. 1 vol. 46. *Winslow v. Tighe*, 2 Ball & Bea. 205. *Rowe v. Chichester*, Ambl. 719. *Holt v. Holt*, 1 Ch.

Ca. 190, which seems to be the oldest case. *Owen v. Williams*, Ambl. 734. *Featherstonhaugh v. Fenwick*, 17 Ves. 299.

(*o*) *Pickering v. Vowles*, 1 Bro. C. C. 197.

(*p*) 11 Ves. 383, and 15 Ves. 236. What is called the Rumpfard Market case [Select Cas. Ch. 61] is the leading case on the subject. See also *Randall v. Russell*, 3 Meriv. 190.

(*q*) *Randall v. Russell*, 3 Meriv. 190; and see *Hardman v. Johnson*, ibid, 347.

(1) Vide *Holridge v. Gillespie*, 2 Johns. Ch. Rep. 30.

So where there was a Bequest of an Annuity charged upon the Testator's Leasehold Interest "during the term of the said Lease;" it was held to extend to, and be a charge upon, every renewal obtained by the Devisee of the Freehold Interest; but the Annuitant to contribute to the Renewal Fines in proportion to his Interest (r).

If a Mortgagee of a Renewal Term gains a new Term to commence after the old one, this new Term will be subject to the old Equity of Redemption (s).

If a Trustee (t) or Executor buys an Encumbrance (u), he will be allowed no more than what he really paid.

Trustees not having renewed Leases, as they ought to have done, are answerable, as for a breach of Trust (y); and though Trustees have a discretionary power given to them for the renewal, they must renew when most for the benefit of the *Cestui que Trust* (z).

A renewable Lease has been held not to be inconsistent with a Covenant by a Trustee for Creditors, to let and manage to the best advantage (a).

If a Trust-fund is created by Will, to be laid out in the purchase of Lands, it is a breach of Trust to lay any of it out [*152 in building a House, and making improvements on Lands purchased (b).

It has been held, that if an Executor has a Lease for years determinable upon the Life of J. S. which is, by a reasonable estimate, worth 200*l.* if the Executor does not sell, but keeps it, and J. S. dies in a short time, he will be liable to answer the value of it at the time of the death of the Testator, he being in fault not to sell it. On the other hand, if he should keep the Lease, and J. S. should live fifty years, he shall answer for no more, because here is a contingent gain, and it might have been a loss; and as, if it had been a loss, he must have borne it, so being a gain he shall receive it (c). *Sed quæ.*

It has been decided, that if an Executor takes the advice of a Lawyer, in what he does, the Court will not charge him for misconduct (d); but this is doubtful; and it rather seems, that if under the best advice he could procure he acts wrong, it is his misfortune, but public policy requires that he should be the person to suffer (e). Executors selling a real Estate by private Sale have been considered as justified, they having sold the Es-

(r) Winslow v. Tighe, 2 Ball & Bea. 195.

Earl Mulgrave, 3 Madd. Rep. 491.

(s) Rakestraw v. Brewer, 2 P. Wms. 511.

(a) Kirkham v. Chadwick, 13 Ves.

(t) Darcey v. Hall, 1 Vern. 49.

547.

(b) Bostock v. Blakeney, 2 Bro. C.

(u) Anon. 1 Salk. 155.

C. 653.

(c) Phillips v. Phillips, 2 Freem. p.

(y) Lord Montfort v. Lord Cadogan, 17 Ves. 485. S. C. on appeal, 2 Meriv. 3.

12.

(d) Vez v. Emery, 5 Ves. 144.

(e) Davis v. Blake, 2 Sch. & Lefr.

(z) Lord Viscount Milsington v. 243.

tate for what was estimated to be its value by two creditable Surveyors (f). And if an Executor, without application to the Court, does what the Court would have approved, he will not 153*] be called to account, and forced to undo that, *merely because it was done without such application (g).

If a Legacy be payable at twenty-one, the Interest being given for maintenance, the Executor is not at liberty (unless the Legacy be very small) (h), to make *advancements of the Principal* during the *Infant's* minority; but if after he comes of age such advancements are admitted as a satisfaction of the Legacy, it cannot be claimed (i).

If one Trustee knows and conceals his Co-trustee's sale of the Trust-fund, he is equally liable with the Trustee who actually sold (k).

Executors, in whose names Monies have been invested, are chargeable for negligence by joining in a transfer to a Co-executor upon his representation, that it was required for Debts; but not liable so far as they can prove the application to that purpose, though he possessed other Funds, not through them, which Funds he wasted.

If an Executor or Trustee compound debts or Mortgages, and buy them in for less than is due thereon, he will not be permitted to take the benefit of them himself; but other Creditors or Legatees will have the advantage of it; and for want of them, the benefit goes to the Party who is entitled to the Surplus (l); but if the composition appears to have been made for the benefit of the Trust-Estate, it is an excuse (m).

154*] *In cases of a breach of Trust by Trustees of a Charity, a summary mode of relief is given by means of a Petition under the 52 Geo. 3. c. 110, which Petition must have the Signature of the Attorney General, or of the Solicitor-General, in case only of there being no Attorney-General at the time; and Lord Eldon has observed, that such Signature was not to be affixed without the same deliberation as in the case of an Information (n).

This Act enacts that, "it shall be lawful for the Lord-Chancellor, Lord Keeper, and Commissioners for the custody of the Great Seal, and for the Master of the Rolls and the Court of Exchequer, and they are hereby required to hear such Petition in a Summary way, and upon Affidavits, or such other Evidence as shall be produced on such hearing, to determine the same,

(f) *Sic dict.* Vice-Chan. Leach in C. 68. Lord Shipbrooke v. Lord Hopkinson v. Leech, 30 June, 1818. Hinchinbrooke, 16 Ves 477.

(g) Lee v. Brown, 4 Ves. 369.

(l) See note A. to 3 P. Wms. 251.

(h) Barlow v. Grant, 1 Vern. 255.

Anon. 1 Salk. 155.

(i) Lee v. Brown, 4 Ves. 362; and see Davis v. Austin, 1 Ves. jun. 247.

(m) Blue v. Marshall, 3 P. Wms. 381.

S. C. 3 Bro. C. C. 178.

(n) Ex parte Skinner, in re Lawford Charity, 2 Meriv. 456.

(k) Boardman v. Mostyn, 1 Bro. C.

and to make such order therein, and with respect to the Costs of such Applications, as to him or them shall seem just."

On a reference to a Master under this Statute, he may receive Evidence by Affidavits, and cannot examine Witnesses on Interrogatories (n).

The Act extends only to cases of a plain breach of Trust by Trustees, and not, it seems, to the case of third Persons deriving benefits from such breach of Trusts (o).

If an information has been filed, and afterwards a Petition is presented with the same objects, the Court will not separate them, and give relief under *the Petition upon such objects as are properly the subject of a Petition, leaving the rest to be disposed of on the Information (p).

It is doubtful whether a Petition seeking a variation of a Lease is within the Act; but it is clear that a Petition praying an account of the Assets of a deceased Trustee, is not within it (q).

The Court of Chancery has Jurisdiction to remedy the abuse of a Charity in the management of its revenue by the Governors (r), and this though the Heir of the Founder, and the Visitor, is one of the Governors (s).

A Corporation having a power over an Estate devoted to charitable Uses, will, in the same manner as in the case of an Individual, be prevented acting corruptly in the execution of their Trust (t).

A long Lease of a charity Estate, is *prima facie*, considered as a breach of Trust (u), and remediable as such in Chancery; and the proof of the circumstances that evince it a provident administration of the Trust is thrown upon those who take such a Lease.

Where Charity Lands had been let at a great undervalue the Lease was set aside, and the Lessee decreed to pay the arrears of Rent according to the full value *of the Land, and to [*156 deliver up the possession (x); but in a recent Case, a Tenant of a charity Estate, it was held, should not be turned out of pos-

(n) Greenhouse Ex parte, 1 Wilson, 18.

(o) Ex parte Skinner, in re Lawford Charity, 2 Meriv. 456.

(p) Ex parte Skinner in re Lawford Charity, 3 Meriv. 456.

(q) Ex parte Skinner, 1 Wils. C. 15.

(r) Kirkby v. Ravensworth Hospital, 15 Ves. 314; but see what is said in Attorney-General v. Corporation of Carmarthen, Coop. 30.

(s) Attorney-General v. Dixie, 13

Ves. 519. See the decree in this case, which appears to have been very carefully drawn.

(t) Drummer v. Corporation of Chippenham, 14 Ves. 252.

(u) Vid. Attorney-General v. Griffith, 13 Ves. 565; and see p. 550. Attorney-General v. Owen, 10 Ves. 555. Attorney-General v. Green, 6 Ves. 452.

(x) Reresby v. Farrar, 3 Vern. 414.

session, or have his Lease set aside, merely on the ground of the inadequacy of the Rent reserved (y).

A *Farm Lease*, with the common husbandry covenants cannot be granted by Trustees for a Charity, for *ninety-nine years*, or a term of much less duration, unless it be fair and reasonable, and for the benefit of the Charity (z).

A *Building Lease* for 999 years cannot be sustained, as it is, in effect, parting with the Property (a); and where a Lease of Charity Land was granted for *eighty years*, it was referred to the Master to ascertain whether, under all the circumstances, the Lease was reasonable or unreasonable to such a degree that Fraud might be inferred (b).

A Lease for three Lives, or which is the same thing, for ninety-nine years, determinable on three Lives, of a charity Estate, is not of itself sufficient to induce the Court to set them aside. To set them aside, it is not enough to say that the mode of letting is not the best that might be prescribed, because on such a point there may be great difference of opinion amongst the most experienced; but it must be shown that the mode is so positively bad, that no persons, meaning fairly to discharge their trust, would have resorted to it. This may be said of a Lease [157*] for *a long term of years absolute, at a stationary Rent, because no Man of a reasonable degree of providence would so let his own Estate (c). Leases of charity Estates may be set aside on the mere ground of undervalue, but it must be an undervalue satisfactorily proved, and considerable in amount. It is not enough to show that a little more might have been got for the Estate, than has been actually reserved; still less is it sufficient to infer the underletting from the value of the Property at some subsequent period (d). On these grounds, a Lease of a charity Estate for a long term of years determinable on Lives at a small Rent, on payment of a Fine, but no proof of undervalue, was not set aside; the Corporation, Trustees of the Charity, having been always in the habit of granting such Leases, and the Lease being according to the custom of the country, where the Estates were situated (e).

Trustees for a Charity are not justified in granting a Lease with Covenants for perpetual Renewal (f).

2. The office of Trustee is considered as honorary (g), and it is an established Rule (*Lord Keeper North* called it a great hard-

(y) *Ex parte Skinner in re Lawford Charity*, 2 Meriv. 456.

(z) *The Attorney-General v. Owen*, 10 Ves. 555.

(a) *Attorney-General v. Green*, 6 Ves. 452. *Attorney-General v. Brooke*, 18 Ves. 326.

(b) *Attorney-General v. Backhouse*, 17 Ves. 283.

(c) *Attorney-General v. Cross*, 3 Meriv. 540.

(d) *Ibid.* 541.

(e) *Ibid.* 524.

(f) *Attorney-General v. Brooke*, 18 Ves. 326.

(g) *Ayliffe v. Murray*, 2 Atk. 60.

ship) (h) that a Trustee, Executor, or Administrator, shall have no allowance for his care and trouble, unless there be some provision for that purpose in the Deed or Will creating the Trust (s) (1); and the reason seems to be, *the great difficulty there would be in estimating the *quantum* of such allowance, as one Man's time is more valuable than that of another, and that by such an allowance, the Trust-Estate might be loaded, and rendered of little value; nor is there, perhaps, any great hardship in the Rule, since a Trustee is not compellable to accept the Trust, but may renounce it if he thinks proper (k). If however, from the nature of the Estate, it is necessary to employ a Bailiff (l), or an accomptant (m), he will be allowed such expense; and if he pays an Attorney for his trouble in transacting the Testator's affairs, he will be allowed such payments (n); but an Executor who has renounced and assisted his Co-executor will not thus entitle himself to charge for his trouble (o).

A Trustee, may, it seems, make an Agreement with a *Cestui que Trust* for an extraordinary allowance, over and above what he is allowed by the Trust; and there may be cases where this Court would establish such Agreements, but at the same time would be extremely wary in doing so (p) (2).

It is a Rule, that the *Cestui que Trust* ought to save the Trustee harmless as to all damages relating to the Trust (q), and the same Rule seems applicable to Executors (r). When any extraordinary expense *is honestly and fairly incurred the [*159 Estate must defray it (s) (3). It is in the nature of the office of

(h) *Palmer v. Jones*, 1 Vern. 144.

(i) *Ellison v. Airey*, 1 Ves. 115.
In the matter of Ormsby, an Infant,
1 Ball and Beatty, 189, 90.

(k) *Robinson v. Pett*, 3 P. Wms. 251; and see the cases cited there in note A. *Ayliffe v. Murray*, 2 Atk. 59. *Chambers v. Goldwyn*, 5 Ves. 834. S. C. 9 Ves. 254, 271, and 11 Ves. 1.

(l) 1 Vern. 316.

(m) *Henderson v. M'Iver*, 3 Madd. Rep. 275.

(n) *Macnamara v. Jones*, 2 Dick. 587.

(o) 3 P. Wms. 251.

(p) *Ayliffe v. Murray*, 2 Atk. 59, 60.

(q) *Balsh v. Hyam*, 2 P. Wms. 455.

(r) *Hide v. Haywood*, 2 Atk. 126.

(s) 1 Ball & Bea. 190. *Balsh v. Hyam*, 2 P. Wms. 453.

(1) *Vide Green v. Winter*, 1 Johns. Ch. Rep. 27. *Manning v. Manning*, 1 Johns. Ch. Rep. 527.

A trustee, who was a counsellor at law, and who was to be allowed for "all his advances and responsibilities," is not entitled to a counsel fee, as a general retainer; nor for any thing more than what is understood in the language of courts of equity, to be "just allowances." *Green v. Winter*, *ut supra*.

(2) Whether an agreement with the *cestui que trust*, after the creation of the trust, for the allowance of commissions, would be recognized as binding? *Quere. Manning v. Manning*, 1 Johns. Ch. Rep. 527.

(3) A trustee, who has made advances, in good faith, for the benefit and protection of the trust estate, such as the payment of taxes and incumbrances, is entitled to look to the estate for his indemnity. *Murray v. De Rolinham*, 6 Johns. Ch. Rep. 52.

a Trustee, and, as it seems, of an Executor (*t*), whether expressed in the Instrument or not, that the Trust Property shall reimburse him all the charges and expenses incurred in the execution of the Trust (*1*). That is implied in every such Deed (*u*). But if the *Cestui que Trust* assigns the Estate, the Trustee cannot substantiate his claim against such Assignee (*x*); nor are persons employed by the Trustees to be considered, it seems, as Creditors of the Trust-fund, even though the Trustees are insolvent; but particular cases may be exceptions (*y*). And though a Trustee or Executor take under the Will, a Commission as a satisfaction for his trouble, yet will he be entitled to allowances under a general Trust "to set and manage as he shall think proper, &c. and all other charges and expenses he should think proper" (*z*); but he will not be allowed the Costs of a Suit made necessary by his *Laches* (*a*), nor when he acts from motives of obstinacy and caprice (*b*).

An Executor will not even be allowed any thing for his *management, time, and labour*, in carrying on a trade after the Testator's death (*c*).

160*] *An Executor in *India* passing his Accounts here, is entitled to the Commission upon the Receipts or Payments according to the practice in *India* (*d*).

3. By a Statute (*e*) (brought in, on the suggestion of Lord *Rosslyn*) it is enacted, that when Trustees of *Stock*, or the personal Representatives of such Persons deceased, shall be absent out of the Jurisdiction or not amenable to the process of the Courts of Chancery and Exchequer, or Bankrupts, or Lunatics, or shall refuse to transfer the Stock, or to receive and pay over the Dividends to the Persons beneficially entitled, or it shall be uncertain, or unknown whether they are living or dead, it shall be lawful for the said Courts respectively, in *any cause depending*, to order that the Accountant-General, or the Secretary, or Deputy Secretary for the time being of the Governor and Com-

(*f*) *Hide v. Haywood*, 2 Atk. 126.

(*u*) *Worrall v. Harford*, 8 Ves. 8.

Gaffrey v. Darby, 6 Ves. 497.

(*x*) *Trott v. Dowson*, 1 P. Wms. 779. reversed on appeal, 3 Bro. P. C. 449.

(*y*) *Worrall v. Harford*, 8 Ves. 8.

(*z*) *Webb v. Earl of Shaftsbury*, 7 Ves. 480.

(*a*) 6 Ves. 497.

(*b*) *Taylor v. Glanville*, 3 Madd. Rep. 176.

(*c*) *Burden v. Burden*, 16 Ves. 170.

(*d*) *Chetham v. Lord Audley*, 4 Ves. 72.

(*e*) 36 Geo. 3. c. 90. This Act by the 52 Geo. 3. c. 156, is extended to Trustees of South Sea, East India, and all other Stock.

(1) A trustee will not be allowed for expenditures for *improvements* of the trust estate, though made *bona fide*, such as building houses and mills, clearing land, making roads, &c. Such expences not being within the purview of the trust, which was merely a power to sell land to pay off incumbrances, &c. and to restore the residue: But he may be entitled to the necessary expences of repairs, &c. *Green v. Winter*, 1 Johns. Ch. Rep. 27.

pany of the Bank of England, do transfer the said Stock into the name of the Accountant-General of the Court of Chancery, or of the Deputy Remembrancer of the Court of Exchequer, in trust in such cause, or otherwise into the name of the Persons equitably or beneficially entitled, as the case may require, and as to the Courts shall seem fit; and also to order that the said Accountant-General, Secretary, or Deputy Secretary of the Bank of England, to pay over the Dividends of such Stock as the said Courts shall direct. It was also enacted, that where *one or more, but not all the Trustees, come under any [*161 of the descriptions above mentioned, the said Court may direct those who are forthcoming to transfer the Stock, and receive and pay over the Dividends, as the said Courts shall direct (g).

Upon this salutary Act it has been decided, that where there has been an order in a cause for a transfer of Stock, and the Party on whom the order was made appeared by Counsel, and admitted that he had disobeyed the order to transfer, this was such a refusal by the Party as justified the Chancellor, under the 36 Geo. 3, to order a Transfer.

In a Case where Trustees under a *foreign Will* were dead, and no personal representation was taken out in this country, it was not considered to be a case entitling the Parties to relief under this Act (h).

So where one Trustee was a Bankrupt, and had absconded abroad, and was not likely to return, an Order was made under this Statute *upon Petition*, that the remaining Trustee should transfer Stock into the names of himself and another Person appointed a Co-Trustee (i).

If there be a proper ground for the proceeding, a Bill may be filed to *remove a Trustee*.

Where, therefore, a female Trustee had married a Foreigner, she was removed, though in her Answer an intention of leaving the Kingdom was denied, and a desire expressed of continuing a Trustee (k).

*So where a Testator directed a new Trustee to be appointed, if either of those he had appointed Trustees should die, or become incapable of acting, and one of the Trustees had absconded on a charge of Forgery, it was referred to the Master to approve of a new Trustee (l).

The Court will not, unless with the consent of all Parties, change a mere Trustee for a Wife under a Marriage Settlement, without sending it first to the Master to see if the Person proposed is a proper Person (m).

(g) *Rader v. Kidder*, 13 Ves. 123.

(k) *Lake v. De Lambert*, 4 Ves.

44. (h) *See v. Bank of England*, 8 Ves.

592.

(i) *Williams v. Bird*, 1 Ves. & Bea.

(l) *Millard v. Eyre*, 2 Ves. jun. 94.

3.

(m) *O'Keefe v. Calthorpe*, 1 Atk.

18.

If a person appointed to execute a Trust refuses to accept the Trust, it is the same as if he had not been named (n); but if he has accepted the Trust, and acted in it, he cannot, it seems, by conveying the Estate to a new Trustee, divest himself of his responsibilities and duty (o).

One of three Trustees under an Act of Parliament being gone abroad, and having released, there being no Provision for the change of Trustees, upon a Bill it was referred to the Master to appoint a new Trustee (p).

If Trustees die, the Court will appoint new Trustees (q).

Where the office of trustees is not confined to any personal 163*] qualification, but what any body might *do, such as to see what Timber is fit to be cut, the Court, if the Trustees die, will execute the Trust (r).

If a Trustee has the power of appointing a new Trustee with a more extensive Interest, the Court will not prevent the exercise of his discretion, but will take care that it shall be duly exercised (s).

CHAP. VII.

CHANCERY PRACTICE.

HAVING endeavoured in the preceding pages to give a systematic view of the grounds on which Bills may be filed, and the principles which influence the Chancellor in the exercise of his Equity Jurisdiction, it remains to give a concise statement of the Rules relating to the Practice of the Equity side of the Court of Chancery.

The practical proceedings in Equity are formed, in some respects, according to the course of the *Civil Law*, and in others, in analogy to *Common Law* proceedings (a).

Ancient and uniform Practice constitutes the Law of the Court as much as positive Order (b).

A Suit in Equity is commenced by the filing of a *Bill*. If the Suit is instituted on the behalf of the Crown, or of those who partake of its Prerogative, or whose rights are under its particular protection, as the objects of a Public Charity, the matter of

(n) *Smith v. Wheeler*, 2 Ventr.

(o) *Crewe v. Dicken*, 4 Ves. 100.

(p) *Buchanan v. Hamilton*, 5 Ves.

(q) See *Hibbard v. Lambe*, Ambl.

128.
722.
300.

(r) See *Hewit v. Hewit*, Ambl. 508.

(s) *Webb v. Earl of Shaftsbury*, 7 Ves. 487.

(a) *Davis v. Davis*, 2 Atk. 23.

(b) *Browne v. Bruce*, 2 Meriv. 2.

complaint is offered to the Court by way of *Information* by the Attorney-General, or, on a vacancy in the office, by the Solicitor-General (c); but it differs very little from a Bill except in the style (d).

*If the Suit immediately concerns the right of the [*165 Crown, no Relator is necessarily named, though it usually is, from tenderness to Parties, in regard to Costs (e); but where the Suit does not immediately concern the right of the Crown, a Relator must be named. And if the Relator named is not a responsible Person, the Court will suspend proceedings until a proper Person is named (f). If such Relator has an interest in the Suit, it is termed an *Information* and Bill (g). And where a Person thus files an *Information* in the name of the Attorney-General, he cannot get rid of it without the consent of the Attorney-General, such consent being necessary in all the stages of an *Information* filed in his name (h). If, however, the Suit can be maintained by the Attorney-General, the circumstance of his joining, as Relator, a Person who is not entitled to the equitable relief which he seeks, will not vitiate the proceeding (i). The Queen Consort partakes of the Prerogative of the Crown, and may inform by her Attorney (k).

A Bill (the form of which is derived from the Civil Law) (l), is usually described as consisting of *nine parts. The first [*166 part contains the *Address* of the Bill to the Person or Persons, Lord Chancellor, Lord Keeper (m), or Lords Commissioners (n), holding the Great Seal. If the Seal be in the King's hands (o), or if the Chancellor is Defendant (p), the Bill must be addressed to His Majesty. The second part consists of the names of the Plaintiffs, and their descriptions; but the descriptions of Parties in this part of the Bill does not, it seems, constitute a sufficient averment, so as to put that fact in issue (q). The

(c) King v. Wilkes, 4 Burr. 2554.

(d) Redesd. Tr. Pl. 78. 3rd. edit.

(e) The propriety of naming a Relator, and the oppression arising from a contrary practice, were particularly noticed by Baron Perrot in a cause in the Exchequer, Attorney-General v. Fox. In that case no Relator was named; and though the Defendants finally prevailed they were put to an expense almost equal to the value of the Property in dispute. [Redesd. Tr. Pl. 19. n. (c).] Though the Attorney-General may proceed in his own name, yet where the right is doubtful, it becomes the Crown to have a Relator, that the court may award Costs if it thinks proper. [Per Lord Redesdale, 4 Dow, 8.] If relief is given by the Decree, but not such as was prayed, costs are not given. Attor-

ney-General v. Bolton, 3 Anstr. 820.

(f) Attorney-General v. Tyler, 2 Eden, 230. Lord Redesdale, Tr. Pl. 23.

(g) 4 Bro. C. C. 38.

(h) Anon. MS.

(i) Attorney-General v. Brown, 1 Swanst. 305.

(k) Redesd. Tr. Pl. 19.

(l) Gilb. For. Rom. c. 4.

(m) The authority of Lord Keeper was declared to be the same by the 5 Eliz. c. 18.

(n) The authority of Lords Commissioners was settled by the 1 W. & M. c. 21.

(o) 2 West. Symb. Chan. 194.

(p) 4 Vin. Abr. 385.

(q) Albrecht v. Sussman, 2 Ves. & Bea. 327.

third is called the *stating* part of the Bill, and contains the Plaintiff's Case. In the *fourth* place is a general charge of *confederacy*. The *fifth* part consists of allegations of the Defendant's *pretences*, and *charges* in evidence of them. In the *sixth* part of the Bill there is an averment that the Acts complained of are *contrary to Equity*, and that a Court of Equity alone can afford relief. The *seventh* part consists of a Prayer that the Parties may answer the Premises. The Prayer of the *Relief* sought by the Bill forms the *eighth* part. In the *ninth* part is a Prayer of Process.

Bills filed in the Court of *Exchequer* have another part, termed the *quo minus* part, in which the Plaintiff states himself to be a Debtor and Accountant to the Crown, and that he will be less able to satisfy the Debt, if he has not justice done him in respect of the demand made by the Bill.

167*] *Many different kinds of Bills have been already treated of. Those Bills which become necessary to be instituted in the course of a Suit, either as an addition to, or a continuance of, the Bill, or seeking the benefit of a former Bill, or of a Decision made upon it, or with a view to obtain a Reversal of such Decision, will be treated as we proceed, and according as they arise in the progress of the Suit. Some of these Bills are called "Bills not original," and others, "Bills in the nature of original Bills;" but might, perhaps, with more of meaning, be termed *Secondary Bills*.

A Bill must be signed by Counsel (r), a practice introduced by *Sir Thomas Moore* (s), and if it appears in any stage of the Suit that the Bill was not so signed, it will be ordered to be taken off the File, and the Plaintiff pay the Costs (t).

If the Bill contains matter criminal, impertinent, or scandalous, such matter may be expunged (u), and *the Plaintiff and the Counsel will be ordered to pay Costs to the Party aggrieved (x).

Pleadings often run into a great deal of unnecessary verbiage

(r) The framing of Bills is usually the province of the Junior Counsel; it is of great importance, and requires much knowledge and judgment. In no other science is so much expected from the younger members. In all perplexed and difficult questions, it is prudent to have the opinion of some Senior Counsel upon the fitness of the Bill for its intended purpose; it may ultimately save much expense and disappointment. I have heard *Lord Eldon* jocosely observe, that *Lord Thurlow* thought a machine might be invented for the drawing of Bills; but in this sarcasm that great judge too much underrated the knowledge,

judgment, and experience, requisite in the framing of Bills in matters of importance. With more truth it has been remarked, "that the mere form of bringing a question before a Court, is of itself a science, an art less understood, and more difficult to learn, than the construction and use of the most complicated machine, or even the motions of the heavenly bodies."

(s) 1 Hargr. Law Tracts, p. 302.

(t) *French v. Dear*, 5 Ves. 547. *Dillon v. Francis*, 1 Dick. 68.

(u) See post, tit. Scandal.

(x) *Emmerson v. Dallison*, Ch. Rep. 194; and see *Redeod. Tr. Pl.* 39. edit. 3rd.

(y), and Bills are seldom comprised in so few as fifteen sheets, the length prescribed by an order of *Lord Bacon*. Formerly, the Bill contained very little more than the *stating* part, with a simple Prayer, that the Defendant might answer the matters contained in it, and then came the Prayer for relief. The Plaintiff's Equity must appear in the *stating* part of the Bill (z). If the case stated in the Bill does not entitle the Plaintiff to a Decree, a Demurrer will lie (a).

Pleadings in Equity are seldom so precise as they ought to be ; at the same time it is to be considered that from their nature they will not admit of the same precision as Pleadings at Law (b). Whatever is essential to the rights of the Plaintiff, and is necessarily within his knowledge, ought to be alleged positively, and with precision ; and it is not a sufficient averment of a fact in a Bill to state that the Plaintiff is *so informed* (c) ; but the claims of the Defendant may be stated in general terms ; and if a matter essential to the determination of the Plaintiff's claims is charged to rest in the knowledge of the Defendant, or must of necessity be within his knowledge, and is consequently the subject of a part of the discovery *sought by the Bill, [*169 a precise allegation is not required (d).

The *interrogating* part had its birth before the *charging* part. *Lord Kenyon*, in the Bills he drew when at the Bar, never put in the *charging* part ; which does little more than unfold and enlarge the statement (f). If there is nothing in the prior part of the Bill to warrant an Interrogatory, the Defendant is not compellable to answer it (g) ; but under a general charge, as of the fact of payment of Money, the Plaintiff may interrogate as to all the circumstances that go to prove or disprove the truth of the fact, as *when, where, &c.* without *particular* charges (h) ; though he cannot interrogate to a distinct subject as to which there is no allegation in the Bill (i) ; but though not bound to answer, yet if he has done so, and the answer is replied to, the fact is effectively put in issue (k).

The charge of *confederacy and combination* of the Defendant with others, is usual in Bills, unless they are amicable Bills (l) ; but seems unnecessary, nor needs an answer (m), unless it be specially charged ; and is improper, where a Peer is Defendant (n).

(y) 1 Ves. jun. 450.
 (z) Flint v. Field, 2 Anstr. 543.
 (a) Hovendon v. Lord Annesley, 2 Sch. & Lefr.
 (b) 2 Sch. & Lefr. 300.
 (c) Reded. Tr. Pl. 33, who cites 1 Ves. 56.
 (d) Reded. Tr. Pl. 33, 34.
 (f) Partridge v. Haycraft, 11 Ves. 574, 5.
 (g) Reded. Tr. Pl. 35, 3d edit.
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(h) Faulder v. Stuart, 11 Ves. 301, 2 ; and see 10 Ves. 290.
 (i) Bullock v. Richardson, 11 Ves. 273 ; and see Jarrard v. Saunders, 4 Bro. C. C. 458, and Muckleston v. Browne, 6 Ves. 62, 3.
 (k) Attorney-General v. Whorewood, 1 Ves. 538, 9.
 (l) Wyatt's Prac. Reg. 141.
 (m) 1 Anstr. 82.
 (n) Reded. Tr. Pl. 33, 3d edit.

Bills usually state, that the Party is *remediless by the Rules of 170**] *the Common Law*, but this need not be *true in every instance; in those cases, for instance, where the Common Law Courts have assumed a Jurisdiction which Courts of Equity alone had before (o). For a great while, Courts of Law would not assist a Man who could not make *Profert*; but as the Debt existed, though the Party could not comply with the requisites to support an Action, a Bill in Equity might be filed, calling upon the Defendant either to admit the Bond, or give him an opportunity of proving the execution and the loss, and a Court of Equity always interfered. But of late, Courts of Law have, from the hardship, waved that Rule, and permitted a Man to declare upon a lost Bond (p); but *Lord Thurlow* held this new doctrine would not extinguish the Equitable Jurisdiction (q).

In matters of Account (r), Partition of Estates (s), Assignment of Dower (t), and in some other Cases, a Court of Equity will entertain Jurisdiction of a Suit, though a remedy might be had in Courts of Common Law. But, in general, Courts of Equity will not assume Jurisdiction where the Powers of the ordinary Courts of Common Law are sufficient for the purposes of justice; and where a Plaintiff can have as effectual and complete remedy in those Courts as in a Court of Equity, a Demurrer will lie; but by demurring to a Bill because the Plaintiff may have a remedy at Law, the Defendant will not be debarred 171*] of relief in Equity upon a Bill filed by himself, upon *a proper case, if the Plaintiff in the first Bill should proceed at Law and recover (u).

If any other Court of ordinary Jurisdiction, as an Ecclesiastical Court, Court of Admiralty, or Court of Prize (x), is competent to decide upon the subject, a Demurrer will equally hold, except that the Courts of Equity have in the case of Tithes, and in the disposition of the Effects of Persons dying testate or intestate, assumed a concurrent Jurisdiction with the Ecclesiastical Courts (y).

Formerly, it seems, if the matter was proper to be decided at Law, a Court of Law would grant a *Prohibition* (z), but there is no modern instance of such a proceeding.

The *Prayer* of the Bill requires great consideration. Formerly, it appears to have been thought sufficient if the Bill contained only a Prayer for *general relief* (a), which *Mr. Robbins*,

(o) *Campbell v. French*, 2 Cox, 366.

(p) See ante, 1 vol. p. 25, &c. Read and Brookman, 3 T. R. 151.

(q) *Toulmin v. Price* 5 Ves. 238.

(r) See ante, 1 vol. p. 85.

(s) See ante, 1 vol. p. 244.

(t) See ante, 1 vol. p. 242.

(u) 3 P. Wms: 397.

(x) See 7 Ves. 593.

(y) *Redeod. Tr. Pl.* p. 101, 3d edit.

(z) See what is said in argo. in *Ashton v. Adams*, 3 Salk. 83.

(a) *Cook v. Martyn*, 2 Atk. 2, 141. 2 Mod. 91. I have heard the late Mr. Lloyd very strenuously defend the position; and Lord Eldon has repeatedly held the same doctrine.

an eminent Counsel, used to say, "*was the best Prayer next to the Lord's Prayer (b) ;*" but the Practice now is, to pray *particular relief*, though if the particular relief prayed by the Bill cannot be given exactly as prayed, the Court will assist the particular Prayer, under the general Prayer (c) ; but relief, inconsistent with the specific relief prayed, cannot be given under the general Prayer (d), unless in the case of an **Informa-* [*172 *tion by the Attorney-General* suing on behalf of a Charity (e), or where a Bill is filed by an *Infant (f)*, who may have a Decree upon matter arising upon the state of his Case, though he has not particularly insisted upon and prayed it by his Bill. But a Bill may be framed with two different aspects, so that if in one view of the Case the relief prayed fails, the other may be sustained (g).

If a Bill be filed for an account of fraudulent dealing, it need not specially pray that every Bond, every Instrument taken by the Defendant without sufficient consideration, should be set aside ; the prayer for general relief is sufficient for that purpose ; and upon that prayer the Court may give every relief consistent with the case made by the Bill (h).

The concluding prayer of the Bill is that process may issue, requiring the Defendants to appear to, and answer the Bill ; and if an Injunction, or a Writ of *Ne exeat Regno* is necessary, or if any Defendant has privilege of Peerage, or is a Lord of Parliament, (since the union with Ireland an Irish Peer, who is not a Member of the House of Commons, is considered as a Lord of Parliament,) (i) a Prayer for **that purpose* or for [*173 a Letter missive, before the prayer of Process is necessary ; and in case the Attorney-General, as an officer of the Crown, is a Defendant, instead of praying process against him, the Bill must pray that he may answer it, upon being attended with a Copy.

Parties to Suits.

In the framing of a Bill, it is a material, and often a perplexing, consideration, what Persons are necessary Parties. The

(b) See 1 Atk. 3, and 3 Atk. 132.

(c) *Beaumont v. Boulton*, 5 Ves. 495. 2 Ves. jun. 401.

(d) *Lord Walpole v. Lord Orford*, 3 Ves. 416; and see *Grimes v. French*, 2 Atk. 141. Redead. Tr. Pl. p. 31, and the cases there cited. 1 Ves. jun. 426. 12 Ves. 43 13 Ves. 114; but see *Durant v. Durant*, 1 Cox, 58, where a different relief was given from that prayed for.

(e) *Attorney-General v. Janes*, 1 Atk. 355. *Attorney-General v. Whiteley*, 11 Ves. 247. *Attorney-General*

v. Parker, 1 Ves. 43. *Attorney-General v. Smart*, 1 Ves. 72. *Attorney-General v. Breeton*, 2 Ves. 426. *Attorney-General v. Scott*, 1 Ves. 418; and see what is said in *Attorney-General v. Jackson*, 11 Ves. 367.

(f) *Stapilton v. Stapilton*, 1 Atk. 6. (g) As in *Muckleston and Browne*, 6 Ves. 52; see *Bennet v. Vade*, 2 Atk. 325. Redead. Tr. Pl. 71, 3d edit.

(h) *Roche v. Morgett*, Dom. Proc. 2 Sch. & Lefr. 729.

(i) *Robinson v. Lord Rokeby*, 9 Ves. 601.

Decisions on this subject are numerous, but it will only be necessary to advert to the leading Cases, from which, it is apprehended, rules may be extracted, decisive of the necessary parties in all cases.

If on the *face of the Bill* it appears that there are not sufficient Parties, a *Demurrer for want of Parties* will lie; but where it does not appear on the face of the Bill, a *Plea of want of Parties* may be resorted to, or an objection may be taken at the hearing of the cause (*k*); but in such case the Bill is not dismissed, as *Sir J. Jekyll* thought it should (*l*); but the cause will be ordered to stand over upon paying the costs of the day (*m*). The usual order in such cases is, to "let the Cause stand 174*] over, with liberty *for the Plaintiff to amend the Bill by adding Parties (*n*)."

It has been determined that where a Bill is dismissed to which the Defendant might have demurred, but did not, he shall have no costs (*o*); and *Vice Chancellor Leach* held, that when a Bill on the hearing stood over for want of Parties, with leave to amend, the Defendant was not entitled to the costs of the day, as he might have demurred (*p*).

Where it appeared on an *Appeal* from a Decree at the Rolls, that Parties were wanting, *Lord Thurlow* ordered the cause to stand over, with liberty to the Plaintiff to file a Supplemental Bill merely to add Parties (*q*).

If, however, a Plaintiff, on the hearing of the cause, waves the relief he prays against a person, it answers the objection for want of making such person a Party (*r*); and if he agrees to dismiss his Bill as against a Person unnecessarily made a Party, it does away the objection on account of such unnecessary Party, and the cause may proceed against the other Defendants (*s*).

Merely naming a Person in a Bill as a Defendant does not make him a Party, unless process is prayed against him (*t*).

175*] *Even where the cause had been heard, and a decretal Order made, liberty has been given, not to amend for want of Parties, but to file a Supplemental Bill, in which the necessary

(*k*) *Darwent v. Walton*, 2 Atk. 510.

(*l*) See *Stafford v. City of London*, 1 P. Wms. 429; but his decree was reversed by Lord King, *Jones v. Jones*, 3 Atk. 110.

(*m*) *Anon.* 2 Atk. 14. *Jones v. Jones*, 3 Atk. 110. S. C. 1 Dick. 96. *Green v. Poole*, 4 Bro. P. C. 122, *East India Company v. Neave*, 5 Ves. 185; but this latter case says nothing as to costs.

(*n*) *Windsor v. Windsor*, 1 Dick. 707.

(*o*) *Anon.* 23 Geo. 2 1749. MF.

(*p*) See *Mitchell v. Bailey*, 3 Madd. Rep. 61.

(*q*) *Holdsworth v. Holdsworth*, 1 Dick. 799.

(*r*) *Pawlet v. Bishop of London*, 2 Atk. 295.

(*s*) *Wicks v. Marshall*, 3 Atk. 400. *Sed qu.* Whether the Bill should not be dismissed against such Defendants before the cause is heard; see *Rumney v. Morgan*, 4 Price, 266.

(*t*) *Windsor v. Windsor*, 2 Dick. 707.

Parties might be brought forward (u) ; but a Plaintiff cannot put off a Cause for defect of Parties *without consent, or a special ground* ; as that he was not aware of the existence of such Parties (x).

Suits are generally prosecuted and defended by Parties in their own names only ; though by leave of the Court it may be done by others ; as by a *Prochein Amy*, where a *Feme Covert* sues her Husband, in respect of her separate Property (y), or where he is exiled, or has abjured the Realm ; or by a *Guardian* or *next Friend*, in the case of *Infants* (z), or persons deaf and dumb (a) ; or by *Committees*, on behalf of *Lunatics* or *Idiots*. An Information at the relation of a Lunatic is not proper ; he, or some person on his behalf, must be a party (b).

The *Prochein Amy* need not be a Relation, but must be a person of substance, because liable to costs (c).

The consent of an Infant to a Bill filed in his name is not necessary, but it is in the case of a Bill filed on behalf of a *Feme Covert*.

If a *Prochein Amy* of an Infant Plaintiff *dies*, the Defendant may move, upon four days notice to the *Plaintiff's Clerk [*176 in Court, that the Master should appoint a new *Prochein Amy* (d).

So, a Suit may be entitled either in the Party's own right, or in right of another, or in both their rights ; of the first sort are most suits in Chancery ; and of the second kind are, suits by Executors, Administrators, Trustees, &c. and of the last sort are suits by Baron and Feme, for Lands, &c. in right of the Wife.

A Trustee may in some cases file a Bill in his own name only (e), as where one Trustee seeks relief against a Co-Trustee, for a breach of Trust (f) ; but, ordinarily, the *Cestui que Trust*, where the Bill is for an Execution of the Trust, should be made a Party (g).

If the Trustees of a term and the *Cestui que Trust* are before the Court, an intermediate Trustee of the Equitable Interest need not be made a Party to a Bill filed to carry the Trusts of the Term into Execution (h).

On a Bill filed by a *Cestui que Trust*, the Trustee is not ne-

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| (u) Jones v. Jones, 3 Atk. 110. | (d) Lancaster v. Thornton, Ambli. 398. |
| (z) Innes v. Jackson, 16 Ves. 356 | (e) Toth. 285. 2 Atk. 43. |
| (y) Lady Ellibank v. Montolieu, 5 Ves. 743 | (f) Franco v. Franco, 3 Ves. 75. |
| (z) See Redesd. Tr. Pl. 20, 3d edit. | (g) Hanne v. Stevens, 1 Vern. 110. |
| (a) Ibid. p. 23 n. (a). | Kirk v. Clarke, Prec. Ch. 275. Adams v. St. Leger, 1 Ball and Beatty, 184. |
| (b) Attorney-General v. Bucknall, 2 Atk. 328. | (h) Head v. Lord Teynham, 1 Cox. 57. |
| (c) Prec. Chan. 376. Anon. 1 Atk. 570. | |

cessarily a Party (i) ; but in general, it seems, he is made a Party (k).

Two Plaintiffs cannot join in one Bill, where their Interests are several ; and a Bill containing things of distinct natures, brought against two or more Persons, is demurrable (l). But 177*] on a Bill for Tithes, several *Parishioners may be made Defendants to the Bill, because the demand against them is of the same nature. So where a Person claims a general right to the sole fishery of a River, he may file a Bill against several persons claiming several rights in the fishery, as Lords of Manors, occupiers of Lands, or otherwise (n). And sometimes, for avoiding multiplicity of Suits, and to bring all Parties who may be affected before the Court, the Suit is by, or against, divers Parties, who have separate rights or interests, such as Devisees, Creditors, and the like.

Where a Bill seeks a discovery of the necessary Parties (o), or where Persons interested are out of the Jurisdiction of the Court (p), and it is stated so in the Bill, and proved (q), it is not necessary to make them Parties (r). And though in these Cases the Court cannot compel them to do any act, it can proceed against the other Parties ; and if the disposition of the property is in the power of such other Parties, the Court may act upon it (s).

It seems advisable to add the name of a Person out of the Jurisdiction of the Court as a Party to the Bill, so far as may be necessary to connect his case with that of the other Parties ; and the Bill may pray process against him in case he should become amenable to such process ; and if in fact he should be- 178*] come *so amenable pending the Suit, he ought to be brought before the Court, either by issuing process against him, if process has been prayed against him, and if not, by amending the Bill for that purpose, if the state of the proceedings will admit of such amendment, or by Supplemental Bill, if they will not (t).

If the absent Parties are to be active in the performance of a Decree, as if a Conveyance be necessary, or if they have rights wholly distinct from those of the other Parties, the Court cannot proceed to a determination against them (u). Hence there sometimes arises an absolute defect of justice which seems to

(i) Kirk v. Clarke, Prec. Ch. 275.

(k) 1 Eq. Abr. 72. 2 Bro. C. C. 225. 7 Ves. 3.

(l) 1 Vern. 29. Hardr. 337. See post. tit. Demurrer.

(n) 1 Atk. 148.

(o) 1 Vern. 95.

(p) See Prec. Chan. 83. 2 Atk. 510.

(q) Travers v. Buckley, 1 Ves. 385.

Cowslad v. Coley, 1 Vern. 150; and see 2 Vern. 380. Derwent v. White, 2 Atk. 510. Prec. Ch. 83.

(r) Redesd. Tr. Pl. 134, 3d edit.

(s) Smith v. Hibernia Company, 1 Sch. & Lefr. 240. Williams v. Whim Yates, 2 Bro. C. C. 399; but see Fell and Brown, 2 Bro. C. C. 277.

(t) Redesd. Tr. Pl. 134, 3d edit.

(u) Ibid. 25, 134, last edit.

require the interposition of the Legislature (x). In cases of Interpleader, the Court, as before observed (y), has got over this difficulty, and if the same principle were adopted in all cases, it would, without any injustice, remedy the inconvenience.

Where an Executor was outlawed, and a witness proved he had inquired after and could not find him, it was considered unnecessary to make him a Party (z).

Where a sufficient reason to excuse the defect of Parties is suggested by the Bill, as where a personal Representative is a necessary Party, and the Bill states that the representation is in contest in the Ecclesiastical Court, an objection for want of Parties will not hold (a), unless, perhaps, the Defendant should controvert the excuse made by the Bill, by pleading matter to show it false; as that the contest in the Ecclesiastical* Court [*179 was determined, and administration granted (b).

If twelve months after the death of the Testator, an Executor, who has proved the Will, goes out of the Kingdom, or even to Scotland, an Administrator may, by virtue of the Act (c), be appointed, to become and be made a Party to a Bill or Bills in Equity, and to carry the decree or decrees into effect; but if the Executor returns pending the Suit, he must be made a Party, and the Administrator (his costs being paid) has nothing more to do with it (d).

If there be four Executors, and one only proves, the others renouncing, and the Executor who proves dies, a Bill must be filed not only against the Executors of the Executor who so proved, but against the surviving Executors of the original Testator, for though they renounced, yet they might at any time come in and prove the Will, and the Testator could not be unrepresented until the surviving Executor renounced after the death of his companions (e).

The general Rule as to parties is, that where a Bill is brought for relief (it is otherwise where a *Discovery only*, is sought) (f), all Persons materially interested in the subject of the Suit, however numerous, ought, either in the shape of Plaintiffs or Defendants (g), to be made Parties (h), in order to *prevent [*180 a multiplicity of Suits (i), and that there may be a complete Decree between all Parties having material Interests; but this being a general Rule, established for the convenient administra-

(x) Ibid. 25.

(y) Ante, 1 vol. p. 176.

(z) Heath v. Percival, 1 P. Wms. 684.

(a) 2 Atk. 51.

(b) Redesd. Tr. Pl. 227, 3d edit.

(c) 38 Geo. 3. c. 87.

(d) Rainsford v. Taynton, 7 Ves. 460.

(e) Arnold v. Blencowe, 1 Cox, 426.

(f) Sangosa and East India Company, 2 Eq. Abr. 170.

(g) Wilkins v. Fry, 1 Meriv. 262.

(h) See on the subject Knollys v. Alcock 7 Ves. 563. 2 Eq. Cas. Abr. 176. 2 Atk. 296, 515.

(i) See 2 Atk. 51.

tion of Justice, is subject to some exceptions, introduced from necessity, or with a view to practical convenience.

Where, therefore, Persons interested are *very numerous* (k), as in the several cases of the *Water Works Company* (l), the *New River Company* (m), *Drury Lane Theatre*, and the other Theatres (n), the *Philanthropic Annuity Institution* (o), and others of the kind (p), the Court has permitted a *few* to sue on behalf of themselves and others interested. And where a legal Body acts by Committees, it is enough to consider a Contract as made with those who think proper to undertake, looking to the body for which they undertake, for indemnity; and Plaintiffs at Law cannot be nonsuited, nor can they defend an action against them, upon that ground (q).

But where there was a Society for relief in sickness, &c. by means of a fund raised by a subscription of the Members, and a Suit was instituted against the Trustees, by some Members, 181*] for an account, that *all the Members, though upwards of forty-seven in number, must be Parties; such Members being considered in the character merely of a Partnership, they having no corporate capacity (r).

The cases of *Creditors* (s) and *Legatées* (t), suing on behalf of themselves, and others; and, by one of many entitled to *Prize Money* (u), form also, from necessity, exceptions to the general rule. But where all the Parties to a Vestry-order were not made Parties to a Bill for the payment of Money allowed by the order, the Court refused to make Decree (x).

(k) See Prec. Ch. 592.

(l) 2 Vern. 420.

(m) 11 Ves. 429.

(n) See Moffat against Farquharson, 2 Bro. C. C. 338.

(o) 16 Ves. 921.

(p) See Pearce and Piper, 17 Ves. p. 1, and Lloyd and Loaring, 6 Ves. 779. Some, of a number of Creditors, parties to a Trust Deed for payment of Debts have been permitted to sue on behalf of themselves, and the other creditors named in the Deed, for the execution of the Trust. Reded. Tr. Pl. 136, 3d edit.

(q) Cousins v. Smith, 13 Ves. 544; and see Cullen and Duke of Queensbury, 1 Bro. C. C. 101.

(r) Beaumont v. Meredith, 3 Ves. & Bea. 182.

(s) Leigh v. Thomas, 2 Ves. 313. Anon. 3 Atk. 571.

(t) Reded. Tr. Pl. 136.

(u) Good and Blewitt, 13 Ves. 397; and see Brown and Harris, 13 Ves. 397.

(x) Henchman v. Ayer, Hard. 333. Com. Dig. tit. Ch. E. 2. Relief ap-

pears to have been given in *James v. Rich*, [mentioned in *Precedents in Chan.* p. 42,] in favour of persons who had been Churchwardens, and laid out Money for the use of the Parish, against the then Churchwardens and others. It is, I believe, the first case of the kind, and arose probably from the *want of relief at Law*. In another case, early in the reign of William and Mary, [mentioned in *Precedents in Chancery*, p. 43,] similar relief appears to have been given; but in the year 1692 the Court seems to have thought that the Spiritual Court was the proper place in which to obtain relief in these cases. [Batteley and others v. Cooke, Prec. Chan. p. 42 S. C. not so fall, 2 Vern. 262.] In a subsequent case in 1731, [Blackbourne v. Webster and others, 2 P. Wms. p. 632] the Chancellor decreed a Parish Rate to be made to reimburse a Party who had advanced Money for the building of a Workhouse, but Lord Thurlow doubted the authority of this decision. [See note 2 to 2 P. Wms. p. 634.]

Although the old Rule, that all persons having *any [*182 charge upon, or interest in, the Estate, however numerous, must be made Parties, has been dispensed with for purposes of convenience, yet it may often be provident to make a single Annuitant a Party for the purpose of taking the Accounts so far as may be requisite (a).

For the application of personal Estate among next of Kin, or Persons claiming under a general description, as the Relations of a Testator or other Person, when it may be ascertained who are all the persons answering that description, a Bill has been admitted by one Claimant on behalf of himself and the other persons equally entitled (b).

If a Legacy be given to two, one could not sue; but when Legacies are given to several, each alone may sue for his Legacy (c).

A *residuary Legatee* filing a Bill, must, in general, bring before the Court all Persons interested in the residue (d).

In general, where a Bill is filed for equitable relief as to a *Rent-charge*, all the Persons whose Estates are liable must be brought before the Court, that complete Justice may be done, and the question tried in the presence of all who are interested, and may *have claims to contribution among them (e). [*183 But there are exceptions to this Rule; as where it is impracticable, or so inconvenient as to be almost impracticable (f); and there seems a difference, where the Rent-charge is claimed by a *Charity* (g).

If a Bill be filed to establish the Plaintiff's right to demand service from the Individuals of a large district, to his Mill, it is not necessary to make all the Inhabitants Parties, that being impracticable (h).

It is established, that in the case of Persons interested in *Real*

and in a subsequent case, [French v. Dear, 5 Ves. 550,] where a former Churchwarden filed a Bill against the Parish Officers and forty Inhabitants for money laid out under an order of Vestry, Lord Roslyn observed, that if he entertained such a jurisdiction he should ruin half the parishes in the kingdom; but on that point no decision was made, as the case went off on account of an informality in the proceedings. In 4 Vin. p. 529. pl. 9, a case is mentioned where a Bill was filed against 90 parishioners by the Executrix of one of the Churchwardens of Woodford, to be reimbursed Money laid out by the Testator as Churchwarden, for rebuilding the steeple of the Church, and Lord Harcourt decreed that the parishioners should reimburse the

Plaintiff the Money laid out by her Testator, with costs of the suit, and that the Money should be raised by a Parish Rate.

(a) Tharp v. Tharp, 3 Meriv. 512.

(b) Redead. Tr. Pl. 138.

(c) Haycocke v. Haycocke, 2 Chan. Cas. 124.

(d) Ibid.

(e) Attorney-General v. Jackson, 11 Ves. 367.

(f) Ibid. and see Adair v. New River Company, 11 Ves. 429.

(g) Attorney-General v. Jackson, 11 Ves. 365. Attorney-General v. Wyburgh, 1 P. Wms. 599.

(h) Adair v. New River Company, 11 Ves. 444, 5. I have seen many Bills of that description, where only a few of the Inhabitants were Defendants.

Estates, it is sufficient that a Plaintiff making claims relative to such Estates bring before the Court the first Tenant in Tail in being, and if there be no Tenant in Tail in being, the first person entitled to the Inheritance (i), with those claiming prior Interests, omitting those who may claim in Remainder or Reversion after such vested Estate of Inheritance; and a Decree against the Person having that vested Estate of Inheritance will bind those in Remainder or Reversion, though by failure of all the previous Estates, the Estates then in Remainder or Reversion may afterwards vest in possession (k). But in all these cases Persons interested, but not made Parties, have opportunities 184*] given them during the progress* of the Suit of supporting their Interests; the Court being always open to them as to questions upon the management of the Suit, applications for a rehearing, &c. (l) and a Person entitled in Remainder, and afterwards becoming entitled in possession, may appeal from a Decree made against a Person having a prior Estate of Inheritance, and cannot avoid the effect of the Decree by a new Bill (m).

If the King of another Country be interested in the Suit, he must be made a Party, and stated to be out of the jurisdiction of the Court (n).

It is a Rule, that no one need be made a Party, against whom, if brought to a hearing, the Plaintiff can have no Decree (o): for this reason, a *residuary Legatee* need not be made a Party to a Bill by a Legatee, against an Executor (p), nor in such case are other Legatees, out of *personal* Estate only, necessary Parties; but where a Legatee out of *real* Estate files a Bill, every Legatee whose Legacy is charged on such real Estate ought to be before the Court (q). In some cases, however, the Court has regretted that residuary Legatees were not parties to a Bill by a Legatee, where points have arisen in which they were materially interested. So a Bankrupt is not a necessary Party to a Suit brought against Assignees of his Estate (r); but if a Bill 185*] is brought for the *discovery* of a Bankrupt's* Estate, the Bankrupt may, perhaps, be made a Party (s).

(i) Leonard and Sussex, 2 Vern. 527. Giffard v. Hort, 1 Sch. and Lefr. 408. Fletcher v. Tollit, 5 Ves. 10. Lloyd and Johns, 9 Ves. 68. Reynoldson against Perkins, Amb. 564. S. C. 1 Dick. 427. Cockburn and Thompson, 16 Ves. 327. Finch v. Finch, 2 Ves. 493; but see Gilb. 164; 1 Chan. Cas. 220. Proc. Chaa. 278.

(k) Redesd. Tr. Pl. 141.

(l) Cockburn v. Thompson, 16 Ves. 327.

(m) 1 Sch. & Lefr. 386. 411.

(n) This was done in the case of

the King of Spain, in De la Torres v. Bernaldes, a cause which came on 22 April 1818, before Vice-Chancellor Leach.

(o) De Golls v. Ward, 3 P. Wms. 310, in note 1.

(p) Browne v. Douthwaite, 1 Madd. Rep. 446. 1 Bro. C. C. 303.

(q) Morse v. Sadler, 1 Cox, 332.

(r) De Golls v. Ward, mentioned in note 1 to 3 P. Wms. 311, contra, 2 Vern. 32.

(s) Sharpe v. Gamon, 2 Vern. 32. See ante, 1 vol. p. 213; but see 1 Ves. & Bea. 550.

So, also, Persons ought not to be made Parties who may be examined as witnesses, and against whom no relief is prayed; and such unnecessary Party may demur or plead, as the case requires (t): the exceptions to this Rule are in the case of *Agents* to a Corporation (u), and of *Arbitrators* (x), and *Attornies* who have fraudulently prepared deeds, sought to be set aside (y).

The Husband must be a Party to a Bill filed against his Wife, unless he is an exile, or has abjured the Realm (z). When a Husband files a Bill for things merely in action belonging to the Wife, as a Bond, &c. she must join in the Suit; but it is otherwise where he claims a Rent running in the Wife's right after Marriage; for if the Husband sued alone, and the Bill was dismissed, that would not conclude the case; and if he died before a Decree, the Wife could not revive the Suit (a). The Committee of the Estate *of an Idiot or Lunatic must be made [*186 a Defendant with the Person who is under his care (b).

A wife may sue alone for a separate maintenance without the Husband (c).

To a Bill by the Assignee of a Judgment the Assignor is a necessary Party (d).

A Relator who has some Interest, is a necessary Party to an Information (e); but he need not be the Person principally interested (f).

If the Attorney-General files an Information, and a Person is dead without Heirs, and the persons claiming his Interest are necessary Defendants, the Solicitor-General must be made a Defendant (g).

An Administrator, though insolvent, must be made a Party to a Bill for a discovery of Assets (h); but a Bill for a discovery of real Assets may be brought against an heir, in order to preserve a Debt, without making an Administrator of the personal Es-

(t) *Plummer v. May*, 1 Ves. 426; and see 2 Bro. C. C. 252, 332. 2 Ves. jun. 454. 6 Ves. 143 and 7 Ves. 207.

(u) *Wych v. Meal*, 3 P. Wms. 310. *Plummer v. May*, 1 Ves. 426. *Le Texier v. Margravine of Anspach*, 15 Ves. 164. S. C. MS.

(x) *Dummer v. Corporation of Chippenharn*, 14 Ves. 152. *Stewart v. East India Company*, 2 Vern. 360.

(y) *Bennet v. Wade*, 2 Atk. 328. 1 Amtr. 37. 1 Sch. and Lefr. 227. in *Texier v. Margravine of Anspach*, MS. the Lord Chancellor said, "If you mean to make an Attorney pay costs as having mixed himself in a case of fraud, you must not merely make him a Party to the Bill, but must also pray that relief against him, or, I think, if it is looked into, it

will be found that a Demurrer will lie." See also S. C. reported 15 Ves. 164, much to the same effect.

(z) *Redesd. Tr. Pl. 24*, 3rd edit.

(a) *Clarke v. Lord Angier*, 1 Chan. Cas. 41.

(b) *Redesd. Tr. Pl. p. 24*, 3d edit. 1 Chan. Cas. 19.

(c) *Regnes v. Lewis*, 1 Oba. Cas. 35.

(d) *Cathcart v. Lewis*, 1 Ves. jun. 463.

(e) *Redes. Tr. Pl. 90*, 91.

(f) *Attorney-General v. Bucknall*, 2 Atk. 328.

(g) As was done in *Attorney-General v. Corporation of Bristol*, 3 Madd. Rep. 319.

(h) *Ashurst v. Eyre*, 2 Atk. 51.

tate or Party, where it is suggested that the representation is contesting in the Ecclesiastical Court (i).

Trustees, Parties to a Suit, will not be allowed to change the Trustees under a power for that purpose, without the Authority of the Court (k): and the Court will, upon motion, restrain them.

If a Bill is brought to establish a general *Modus* through a 187*] whole Parish, all the Land Owners must *be either Plaintiffs or Defendants; but if the Plaintiff sues for Tithes in kind, the Defendant may insist upon such *Modus*, though the rest of the Parishioners are not made parties (l). Though a *Modus* be laid in all the occupiers, yet each is liable for the whole, so that suing a part of the occupiers is sufficient (m).

Where a Rector's or an Impropricator's right, does not come in question, he need not be made a Party to a Bill brought for subtraction of Tythes (n).

On a Bill to Establish a Customary Payment in lieu of Tithes, the *Ordinary* must be a Party (o).

If there be a Mortgage by a Tenant in Fee, who creates a Term for that purpose, it is not necessary, on a Bill of Foreclosure, that the personal Representative should be made a Party (p).

If the Heir of the Mortgagee brings a Bill to foreclose, the Executor, as well as the Heir of the Mortgagor must be made a Party (q); and if the Heir of the Mortgagor files a Bill to redeem, the Executor or Administrator of the Mortgagee must be made a Party (r). The heir need not be a Party to a Bill by a Devisee to redeem (s).

A second Mortgagee who files a Bill to redeem a prior Mortgage must make the Heir of the Mortgagor a Party; and that, though the second Mortgage is only of part of the Estate com- 188*] prised in the *first, and under a different Title (t); but it is not necessary to make his personal representative a Party (u).

On a Bill for Foreclosure, brought against the Heir of the Mortgagor, it is not necessary to make the Executor a Party (x).

Whether *all* Encumbrancers, *previous* to the filing of a Bill

(i) Plunket v. Penson, 2 Atk. 51.

(k) Earl of Shaftsbury v. Arrow-smith, 7 Ves. 487.

(l) Rudge v. Hopkins, 2 Eq. Abr. 170. *Sed vid.* 1 Atk. 283.

(m) Hardcastle v. Smithson, 4 Atk. 247.

(n) Carte v. Ball, 3 Atk. 500.

(o) Gordon v. Simpkinson, 11 Ves. 509.

(p) Bradshaw v. Outram, 13 Ves. 234.

(q) 2 Eq. Abr. 77. Clarkson v. Bowyer, 2 Vern. 66.

(r) 2 Freem. 52.

(s) Lewis v. Nangle, 2 Ves. 431.

(t) Palk v. Lord Clinton, 12 Ves. 48. Fell v. Browne, 2 Bro. C. C. 276. Woodcock v. May, Lord Nottingham's MS. noticed 12 Ves. 59. contra, Clarkson v. Bowyer, 2 Vern. 66. Freak v. Horsely, 2 Eq. Abr. 77, 2 Freem. 52.

(u) Fell v. Browne, 2 Bro. C. C. 279.

(x) Duncombe v. Hansley, mentioned in note A. to 3 P. Wms. 333. 13 Ves. 234. Cary v. Ash, 9 March 1808, MS. *Sed vid.* Meeker v. Tanton, 2 Chan. Cas. 29.

of Foreclosure, must be Parties, has been the subject of controversy, and no where, I believe, expressly decided; but the opinion of the Profession, is, that they are necessary Parties. In the *Bishop of Winchester v. Beavor* (y), the Court ordered a Bill of Foreclosure to stand over, to make a Judgment-Creditor (who, according to the Answer, was the only Encumbrancer except the Mortgagee) a Party, but the Court would not determine the general point, whether all Encumbrancers should be made Parties; but if *one* must, if disclosed by the Answer, why not *many*, if they appear by the Answer? The inconvenience certainly follows, as stated in the Case above alluded to, that a man is thus armed with a shield to ward off a Foreclosure; for the Mortgagor might confess twenty Judgments at the time of making the Mortgage, in order to guard against Foreclosure. It is not stated in the Report of the *Bishop of Winchester v. Beavor*, when the Judgment-Creditor *became such, whether [*189 before the Bill was filed, or after, and before the Answer; but as the Court said, a Judgment confessed after a Bill filed would not do, the conclusion is, that the Judgment in that case must have been previous to the filing of the Bill. It is now, indeed, well established, that Encumbrancers, *after* a Bill filed, are not necessary Parties, they being affected by the doctrine of *lis pendens* (z), an alienation pending a Suit being void (a); or, more correctly, perhaps, the Purchaser takes subject to the effect of the suit. It is certainly a maxim *Pendente lite nihil innovetur* (b); but the true interpretation of that Rule is, that a Conveyance does not vary the rights of the Parties in a Suit; for Suits would be interminable, if one Party pending the Suit could, by conveying to others, create a necessity for introducing new Parties; and though ordinarily, a Decree binds only the Parties to the Suit, yet he who purchases during the pendency of the Suit; is bound by the Decree that may be made against the Person from whom he derives title (c): an Assignment, for instance, of the Equity of Redemption, pending a Bill for Redemption, puts the Assignee upon the same footing as the Person from whom he obtained the Assignment (d). So, the Purchaser of an Estate charged with Debts, pending a Suit by Creditors, is bound (e); but in all these cases the Purchase, during *the pendency of the Suit, is not absolutely annulled, and [*190 the Purchaser takes, subject to the effect of the Suit upon the

(y) 3 Ves. 314.

(z) *Garth v. Ward*, 2 Atk. 174.
Bishop of Winchester v. Paine, 11 Ves. 195.

(a) *Walker v. Smallwood*, Ambl. 676.
Gaskill v. Durdin, 1 Ball & Bea. 167.
Moore v. Macnamara, Ibid. 187, 8.

(b) Co. Litt. 344b.

(c) *Metcalfe v. Pulvertost*, 2 Ves. & Bea. 204, 5, 6, 7.

(d) See case put by Lord Hardwicke, in *Garth v. Ward*, 2 Atk. 175.

(e) *Walker v. Smallwood*, Ambl. 676.

Property (f); but the *Master of the Rolls* observed in the *Bishop of Winchester v. Paine* (g), that if the legal Estate be acquired during the pendency of the Suit, it might be necessary, in order to avoid it, to have recourse to a new Suit. He determined also, in that case, that the Suit having *abated* by the death of the Mortgagor, did not render it necessary to make Parties, those, who when the Bill of Revivor was filed were Encumbrancers, but were not such when the original Bill was filed; and he observed, that if the Encumbrancers acquired their Title during an abatement of the Suit, there would be great difficulty, though *Lord Nottingham* seems to have thought they were not necessary Parties. Persons claiming under a Mortgage must be Parties to a Bill to redeem, and the Mortgagor must pay the expense of making them Parties (h); but where a Mortgagee, who has a plain Redeemable Interest, makes several Conveyances upon Trust; in order to render it difficult for a Mortgagor or his Representative to redeem, it is not necessary that the Plaintiff should trace out all the Persons who have an Interest in such Trust to make them Parties. But where the Redemption depends upon equitable circumstances and the Plaintiff is not in the common case of Redemptions, and where the Mortgagee in Fee has made an absolute conveyance with several Limitations and Remainders over, the Decree cannot be complete 191*] *without bringing, at least, the first Tenant in Tail before the Court (h).

If there have been several *mesne Assignments* of a Mortgage, all those Assignees are not necessary Parties, (unless the Mortgagor was a Party to the Assignments, or declared what was due,) but only the last Assignee (i). An Under mortgagee, bringing a Bill to foreclose, must make the original Mortgagee a Party (k).

On a Bill to redeem, the Person having the legal Estate must be before the Court, for otherwise the Mortgagor cannot have a complete re-conveyance (l).

By the 39th and 40th Geo. 3, c. 36, Courts of Equity are authorized to order the *Bank*, the *East India* or *South-Sea Companies* to transfer Stock, or pay Dividends to Parties in a Suit, and may issue an Injunction to prevent such transfer or payment without the Bank, &c. being made a Party; but this salutary Act, it has been held, does not preclude the Plaintiff from making these Companies, Parties, if advisable (m); but in a re-

(f) See *Metcalfe v. Pulvertoft*, 2 Ves. & Bea. 200.

(g) 11 Ves. 195.

(h) *Wetherell v. Collins*, 3 Madd. Rep. 255.

(i) *Yates v. Hambly*, 2 Atk. 237, 8.

(j) See *Chambers v. Goldwyn*, 9

Ves. 268. *Hill v. Adams*, 2 Atk. 39.

(k) *Hobart v. Abbot*, 2 P. Wms. 642.

(l) *Wood v. Williams*, before V. C. Leach, April 1819, MS.

(m) *Temple v. Bank of England* 6 Ves. 770.

cent case (n), the *Vice-Chancellor* said he should dismiss the Bill, with Costs, against the Bank wherever they were unnecessary Parties, as in cases provided for by this Act; the same to be personally paid by the Plaintiff, the Statute being otherwise rendered useless.

On a Bill against an Executor for an account, it *is not [*192 necessary to make the *Attorney-General* a Party in respect of a Legacy given to a Charity (o).

Where some of the undertakers under the Statute 4 Anne, c. 14, in regard to Briefs, are dead; on a Bill for an account, their Representatives need not be brought before the Court, for they are each answerable, the one for the other (p).

Creditors of a Testator, or Intestate, need not, or rather cannot (r), make anybody but the personal Representative a Party. But in a case of Insolvency (s), or where there are any Persons who have possessed the Estate, or any other Debtors of the deceased who deny they have any such Assets, or apply them improperly (t); or where there is any collusion between them and the Representative, they may in Equity, though not at Law, follow the Assets, make them Parties, and demand an Account (u).

On a Bill, by a Specialty Creditor, for the discovery of Assets descended, the Heir and the Personal Representative must be made Parties (x).

If a Bill be filed by a Creditor by Bond, against a Devisee of the Creditor's real Estate (y), or against an Assignee of the Devisee, the Devisor's Heir must *be made a Party (z). [*193 The personal Representative of the deceased Debtor is also, in general, a necessary Party, as a Court of Equity will first apply the personal Estate in exoneration of the real Assets (a).

If a Bill be filed by the Assignee of a Bond, the Representative of the original Obligee must be made a Party (b).

It is said to be a Rule in Equity, that where two or more are liable to a demand, one alone cannot be proceeded against, but that all the persons liable must be brought before the Court (c).

(n) *Eldridge v. Eldridge*, 3 Madd. Rep. 386.

(o) *Chitty v. Parker*, 4 Bro. C. C. 33.

(p) *Ex parte Angel*, 2 Atk. 162. S. C. Barn. 423.

(r) *Vid. Alsager v. Rowley*, 6 Ves. 748. *Kiernan v. Fitz Simon*, 3 Ridgw. P. C. 18.

(s) *Ibid.* and see *Utterson v. Mair*, 2 Ves. jun. 95, and S. C. 4 Bro. C. C. 270.

(t) *Simpson v. Vaughan*, 2 Atk. 33.

(u) *Newland v. Champion*, 1 Ves.

105; and see *Doran v. Simpson*, 4 Ves. 665.

(x) *Knight v. Knight*, 3 P. Wms. 331. *Madoc v. Jackson*, 3 Atk. 406. *Freke v. Colepepper*, Lord Kenyon's Rep. 133.

(y) *Gawler v. Wade*, 1 P. Wms. 99.

(z) *Warren v. Stawell*, 2 Atk. 125. (a) 3 P. Wms. 331.

(b) *Ray v. Fenwick*, 3 Bro. 25; and see *Cathcart v. Lewis*, 1 Ves. jun. 464.

(c) *Jackson v. Rawlins*, 2 Vern. 95.

Lord Hardwicke says (d), "the general rule of the Court, to be sure, is, where a Debt is joint and several, the Plaintiff must bring each of the Debtors before the Court, because they are entitled to the assistance of each other in taking the Account. Another reason is, that the Debtors are entitled to a Contribution, where one pays more than his share of the Debt: a further reason is, if there are different Funds, as where the Debt is by Specialty, and he might at Law sue either the Heir or Executor for satisfaction, he must make both, Parties, as he may come in the last place upon the real Assets (e). But there are exceptions to this; and the exception out of the first Rule is, that if some of the Obligorers are only *Sureties*, there is no pretence for the *Principal* in the Bond to say that the Creditor ought to bring 194*] the *Surety before the Court, unless he had paid the Debt. The exception out of the second Rule is, that if there are no personal Assets, and this fact appear plainly in the Cause, there is no occasion to bring the Representative of that Co-obligor before the Court (f)." In a Case, however, before *Lord Thurlow*, where a Bill was filed by a Bond-Creditor for an Account of the Assets of the Testator, and to be paid his Bond, in which one *Cobb* was Surety with the Testator, he held it to be necessary that *Cobb* should be made a Party (g), in opposition to what is said by *Lord Hardwicke* as to Sureties, and observed, "that if you sue on a joint and several Bond, I have always understood it was necessary to bring all before the Court to prevent circuitry; but if the Bill states, and the Defendant admits, the Co-obligor to be *insolvent*, the objection seems to be removed (h)." *Lord Eldon*, also, has held, that if the Plaintiff sues upon a joint and separate Bond, he must bring forward all the Obligorers, Principals and Sureties; but that the Rule is dispensed with where it appears that the Sureties are Insolvent, or have not paid any thing; and the demand is accordingly restrained, as a demand against the Principal, who has nothing to demand over (i).

On a Bill for an account of fees, to establish a right, all Persons must be before the Court who *have any pretence to a right, or they will not be bound by the Decree; it is other-

(d) *Madox v. Jackson*, 3 Atk. 406; and see *Anon.* 2 Freem. 127.

(e) See also as to this, *Galston v. Hancock*, 2 Atk. 436. *Freke v. Colpepper*, Lord Kenyon's Rep. 133.

(f) *Collins v. Griffith*, 2 P. Wms. 313. It was there held that if two Obligorers in a Bond be bound jointly and severally, and one dies, the Executors of the deceased Obligor may be sued in Equity for the Debt, with-

out making the surviving Obligor a Party; and that it was the principal advantage of such a Bond that any one of the Obligorers might be sued alone.

(g) *Angerstein v. Clark*, 2 Dick. 738.

(h) *Ibid.*

(i) *Cockburne v. Thompson*, 16 Ves. 326.

wise as to a Judgment at Law, which will not bind the right of a third person.

Though the Person is come of age, during whose Infancy the Will appointed an Executor *durante minore etate*, yet such Executor, if he has not collected in the whole Estate, must be brought before the Court (*k*).

One Joint-Tenant cannot be made a Defendant without the other (*l*).

Upon a Bill for the specific performance of a Covenant by *A.* for the benefit of *B.*, *A.* must be a Party to the Suit (*m*).

Where the rights of the Crown are concerned, if they extend only to the superintendence of a public Trust, as in the case of a Charity, the King's Attorney-General must be made a Party to sustain those rights; and in other cases, where the Crown is not in possession, and a Title vested in it is not impeached, and its rights are only incidentally concerned, it has generally been considered that the King's Attorney-General may be made a Party in respect of those rights, and the Practice has been accordingly (*n*).

If *A.* having outlawed *B.*, files a Bill against *B.* and *C.*, a Trustee for *B.* with respect to an Annuity, and to subject the same to the Plaintiff's Debt, the Attorney-General ought to be made a Party *and the Plaintiff must get a Lease or Grant [*196 in the Court of Exchequer from the Crown (*o*).

A Wife may sue for a separate Maintenance without her Husband (*p*).

It is not, in general, necessary to make an Attorney a Party because he has Title Deeds in his hands; but there may be a special Case in which it might be proper to make him a Party, that the Client may not be allowed by collusion to fence-off a just demand (*q*).

A Decree always guards against the rights of Persons not Parties to the Suit, for it gives relief on the terms that such Persons be not prejudiced (*r*).

SUBPENA AND LETTER MISSIVE.

When a Bill is filed, the first process is a *Subpœna*, unless the Defendant is a Peer, or a Peeress, or a Bishop; they being entitled to a *Letter Missive*.

The rights of Peers to a Letter Missive is very ancient (*s*),

(*l*) Glass v. Ozenham, 2 Atk. 121.

(*i*) Finch, 82.

(*m*) Cooke v. Cooke, 2 Vern. 36.

(*n*) Redesd. Tr. Pl. 24. 3rd edit. who cites 1 P. Wms. 245.

(*o*) Balch v. Wastall, 1 P. Wms. 44b; and see — v. Bromley, 2 P. Wms. 269. Parker's Rep. 368.

(*p*) Regnes v. Lewis, 1 Cha. Cas. 35.

(*q*) Fenwick v. Reed, 1 Meriv. 122.

(*r*) Shine v. Gough. 1 Ball & Beatty, 447.

(*s*) Lord Milaington v. Earl of Portmore, 1 Ves. and Bea. 421.

They are entitled also to a copy of the Bill, though this is often voluntarily waved. It is a privilege of *Peerage*, not of Parliament; and Extends equally to *English* and *Scotch* Peers (t); and since the Union, *Irish* Peers, (with the exception of those who are Members of the House of Commons) are entitled to the 197*] *Letter Missive* (u). *An Injunction or other process not so accompanied will be ineffectual (x).

The *Letter Missive* is obtained by a Petition to the Chancellor, after the Bill is filed, and it is served on the Defendant, with an office-copy of the Bill, signed by the six Clerks; and if he refuses upon such service, to appear to the Bill, he is then served with a Subpœna (y).

Since the Statute (z), it is not now necessary to serve an office-copy of the Bill together with the Subpœna, on a Member of the House of Commons.

By the 4th and 5th Ann. c. 16, it is provided, that no Subpœna, or other process for Appearance, shall issue till after the Bill is filed, and a Certificate thereof brought to the Subpœna Office, except in cases of Bills for an Injunction to stay Waste, or to stay Suits at Law commenced. And if in these excepted cases the Bill is not filed on the third day after the return of the Subpœna, the Defendant need not appear (a). It is, however, a frequent, but irregular, practice, to sue out a Subpœna before the Bill is filed, and to file the Bill before the Return-day.

As many Subpœnas may be obtained as will be necessary, but only three Defendants can be inserted in one Subpœna: a Man and his Wife are considered only as one Defendant, *unless the separate Estate* of the Wife is sought to be charged, in which case, as she is considered to be a *Feme Sole* for other purposes, so she must be separately served with a Subpœna (b).

198*] *Where there is only one Defendant, the body of the Subpœna is left with him (d); but where there are several, the Labels are left with the first Defendant served, showing them the body only, and with the last Defendant the body itself is left (e).

If the Defendant appears, it cures irregularities in the service of the Subpœna; unless it be on the eve of the long Vacation, and the Defendant chose rather to appear than to be liable to an Attachment, in which case he is still at liberty to insist upon not having been served at all, or that he was irregularly served (f).

(t) Ibid.

(u) Robinson v. Lord Bokeby, 8 Ves. 601. Lord Milington v. Earl of Portmore, 1 Ves. and Bea. 419.

(z) 1 Ves. & Bea. 419.

(y) Newland's Harrison's Pract. 101.

(s) 47 Geo. 3. c. 49.

(a) Newland's Practice, 61. 2d Edition.

(b) Jones v. Harris, 9 Ves. 488.

(d) Anon. 3 Atk. 567. De'Tillon v. Sidney, 1 Anstr. 79.

(e) Anon. 3 Atk. 567.

(f) Ibid.

Service at any period of the Return-day of the Subpœna, before twelve o'clock at night, is deemed good Service (g). In several cases the Court has, upon an affidavit of the Merits of the Suit, substituted Service, where the Party goes out of the way, and there is a Person whom he has named in Court as his Agent, and whom the Court can look on as such; as in the case of an Injunction Bill filed for the purpose of restraining an Action at Law, the Attorney at Law is an Agent, constituted by the Person making the demand, for the purpose of prosecuting that demand at Law, and the Suit in Equity is a defence to that demand, therefore Service upon him has been held good Service (h); but the Court will not order such Attorney to put in an Answer without Oath (i). When the Motion is made that Service of the Subpœna on the Attorney at Law *may be [*199 deemed good Service, there must be an affidavit of the truth of the facts stated by the Bill (k) and it must be made by the Plaintiff, not by his Solicitor (l).

It has been holden, that leaving a Subpœna to appear and answer, at the Lodgings of a Defendant, who had left them twelve Months previous, is not good service, though an Order be obtained for that purpose (m).

Service of a Subpœna upon a Defendant, *while abroad* (n), or in *Scotland* (o), is good Service.

The service of a Subpœna upon the Mother or Father-in-Law of an Infant, has, on a Motion for that purpose, been allowed (p); as where the Mother secreted Infants, Parties to the Suit (q).

Where Defendants are beyond the Jurisdiction of the Court, Service of the Subpœna on their Clerk in Court will not be allowed to be deemed good Service, though they have by that Clerk in Court filed a Bill relative to the same subject (r); but where a Bill was filed against two Partners, and one was abroad, the Subpœna against him was, on Motion, permitted to be served on the Partner here (s).

Though a Defendant residing out of the Jurisdiction has given a Power of Attorney to A. to act *for him in the man- [*200

(g) Turn. & Ven. Pract. 68.

(h) 1 Sch. & Lefroy, 239. Delaney v. Wallis, 3 Bro. C. C. 12. Anderson v. Lewis, 3 Bro. C. C. 429. Stevens v. Cini, 4 Ves. 359, overruling Burke v. Vicars, 3 Bro. 24. French v. Roe, 13 Ves. 593.

(i) Anon. 1 P. Wms. 523.

(k) Stevens v. Cini, 4 Ves. 359. Kenworthy v. Accunor, 3 Madd. Rep. 450.

(l) Kenworthy v. Accunor, supra.

(m) Parker v. Blackburn, 2 Vern. 369. *Sed que.*

(n) Scott against Hough, 4 Bro. C. C. 213.

(o) Bourke v. Lord Macdonald, 2 Dick. 587. Shaw v. Lindsay, 18 Ves. 496.

(p) Thompson v. Jones, 8 Ves. 141. Baker v. Holmes, 1 Dick. 18, 77.

(q) Smith v. Marshall, Atk. 70.

(r) Bond v. Duke of Newcastle, 3 Bro. C. C. 386.

(s) Cole v. Gurney, 1 Madd. Rep. 187. Bunb. 107; and see 1 Dick. 24.

agement of his affairs, the Court refused to allow substitution of the Subpœna to appear and answer, on *A. (t)*.

If a Defendant, against whom an *amended Bill* is filed, but upon whom no Subpœna has been served, has appeared upon two Motions, and lives abroad, out of the Jurisdiction, and refuses to answer, the Court will order that Service of the Subpœna, to answer the amended Bill, upon the Clerk in Court, or the Solicitor, be deemed good Service (*u*).

A Subpœna sent under cover to the Person to whom the Defendant had directed his Letters to be sent, has been held good Service (*x*).

If the Defendant be a close Prisoner, Service of the body of the Writ on the Turnkey seems sufficient; but if the Prisoner be within the Rules of the Prison, an Order for such Service seems necessary; though in both cases, personal Service, if feasible, is to be preferred; but no Process can be served upon a Prisoner committed at the Suit of the Crown, without leave (*y*).

If on the Service of the Subpœna contemptuous words are spoken of it, the Offender, upon Motion, supported by the affidavit of two Persons, will be committed without further examination; and a single Affidavit is sufficient to grant an Attachment, upon which he may be examined. If on such Examination the Misdemeanor is confessed, he will be *committed; but if denied, he will be discharged, but without Costs, in respect of the Oath made against him (*z*).

If the Person serving the Subpœna is beaten or abused, the Offender will, on an Affidavit of the fact by more than one Witness, be committed. But though contemptuous words are spoken of a Subpœna, and the Person serving it, severely beaten, yet if the facts are proved by the Oath of a single Person only, the Court will not, in the first instance, order the Offender to stand committed, but make an order upon him to show cause why he should not stand committed (*a*).

Whenever a Person is called upon to answer for a Contempt, the Court exercises a *discretion* on the subject (*b*), and always considers whether the Party acted under a *mistake*, or with intentional *contumacy* towards the Court (*c*).

Appearance.

WHEN the Bill is filed, and process served, the Defendant must *appear*.

(*t*) Smith and Hibernian Mine Company, 1 Sch. & Lefr. 238. overruling Carter and De Brune, 1 Dick. 39. Hales v. Sutton, 1 Dick. 26; and see Ricord v. Hedriff, 2 Meriv. 468.

(*u*) Gildenichi v. Charnock, 6 Ves. 170.

(*x*) Hunt v. Lever, 5 Ves. 147.

(*y*) Turn. and Ven. Prac. 70. Prac. Reg. 403.

(*z*) Newl. Harr. 107.

(*a*) Anon. 3 Atk. 219.

(*b*) Ball v. Coutts, 1 Ves. & Beames, p. 297.

(*c*) Page. Ex parte, 17 Ves. 61.

A Party may, without having a Subpœna served upon him, appear *voluntarily* to a Bill (*d*), and refer it for impertinence (*e*) or plead an answer; and does not lose his Costs by such voluntary appearance (*f*).

*If the Defendant lives within twenty miles of London [*202 the suit is termed a *Town Cause*, and he has four days to appear in after the Return of the Subpœna, unless it was served at least a day before the Return, and then he must appear at the Return day, or the day after; but if the defendant lives beyond twenty miles, it is termed a *Country Cause*, and he has eight days after the Return, to appear unless he is served with the Subpœna at least eight days before the Return, in which case he has only till one day after the Return, to appear (*g*).

The appearance is entered by the Clerk in Court, employed by the Defendant's Solicitor.

Where a Bill is filed against an Infant, he must, if in Town, appear in Court, and have a Guardian assigned him; if he resides in the country, he must sue out a Commission to assign a Guardian (*h*).

If there be a general Letter of Attorney to one, to *appear to and defend Suits*, the Court will order such Attorney to appear for the Principal, and that Service on him shall be deemed good Service (*i*). If an Attorney has once entered an Appearance for a Party he cannot afterwards withdraw it unless by leave of the Court (*x*).

The Attorney-General is not bound to appear to a Suit, though he always does; nor could Process of *Contempt be issued [*203 against him (*l*); but in other cases, if the Defendant neglects to appear, it is considered as a *Contempt* of the Court, and an Attachment will be issued, upon an Affidavit (*m*) of Service of the Subpœna; and if *non est inventus* is returned by the Sheriff, and entered at the Registrar's Office (*n*), an *Attachment with proclamations* may be issued; and if this is also returned *non inventus*, a *Commission of Rebellion* issues, (which by the course of the Court issues only to the Sheriff of *Middlesex*) (*o*), for the Defendant's apprehension; and if upon this Commission he is re-

(*d*) Travers v. Buckley, 1 Ves. 386.
S. P. Anon. MS.

(*e*) Fell v. Master of Christ's College, 2 Bro. C. C. 279.

(*f*) Bowhee v. Grilla, 1 Dick. 38.

(*g*) See Newland's Harrison, 108.

In Turner & Ven. 1 vol. p. 72, it is said, in a town cause, that if the service be on the return-day, or a day or two before, he has four days after the service to appear in; and that in a country cause, if served four or five days before the return, he has only four or five days after the return to appear.

(*h*) Newl. Har. p. 112.

(*i*) Anon. 1 P. Wms. 523. Salvadore and Thornton, 21 Geo. 2. 1747. MS.

(*k*) Menzies v. Rodrigues, 1 Price, 92.

(*l*) See argument in Davison v. Attorney-General, Exchequer, 1813. Barclay v. Russell, 2 Ves. 729. S. C. Dick. 730.

(*m*) See Bromhead v. Smith, 8 Ves. 357. Ord. Ch. 95.

(*n*) James v. Philips, 2 P. Wms. 657.

(*o*) Ibid. in note.

turned *non inventus*, a *Serjeant at Arms* may be moved for ; and if he certifies that the Defendant cannot be taken, a Motion may be made, on his certificate, for an order for a *Sequestration*, directed to certain Commissioners, to sequester the Defendant's personal Estate, and the Rents and Profits of his Real Estate (p).

After a Sequestration the Bill will be taken *pro confesso*.

An Attachment returnable within eight days after the Purification means eight entire days (q).

The Process issued against a Body Corporate to compel an Appearance is by means of a *Distringas*, to distrain them by their Goods and Chattels, Rents and Profits, till they shall obey the Summons or Directions of the Court ; and in the case of a 204*] Peer, if after Service of the Letter Missive, and *afterwards of a *Subpana*, no Appearance is entered, a Sequestration will be ordered without any of the Mesne Process of Attachments, &c. which are directed only against the Person, and therefore cannot affect a Lord of Parliament (u).

If a Bill be brought against *Baron and Feme*, and she alone be taken by Process of Contempt, she may enter an Appearance for herself alone (x).

No Process in respect of a Contempt can be obtained by a Plaintiff suing in *forma Pauperis*, until it is signed by the Six Clerk who acts for the Pauper, and who is himself answerable if any needless or vexatious use is made of the Process (y).

An Attachment for non-appearance cannot, it seems, be taken out, before the Bill is entered in the Bill-Book, though filed in the Six Clerks Office (z).

The writ of Attachment must be made returnable in Term, and there must be *fifteen* days between the teate and return of the different Writs anterior to a Sequestration, or to taking a Bill *pro confesso*, unless the Defendant lives within ten miles of London, in which case an Order may be obtained, on Motion or Petition, to make the several processes of contempt returnable *immediately* (a).

When a *cepi Corpus* is once returned, there is of course an end of all further Process for the caption of the Defendant.

With respect to *Sequestrations*, one of the Processes used to enforce an Appearance, it is necessary to make a few observations :

205*] **Sequestrations* are now a common Process, and are said to have been introduced in *Lord Bacon's* time (c) ; but it

(p) Newl. Har. 115.

(q) Mootham v. Waskett, 1 Meriv. 243.

(u) 3 Black. Com. p. 445.

(z) *Traverse v. Buckley*, 1 Serjeant Wilson's Rep. 264.

(y) Ord. Chan. 125.

(z) *Leman v. Newnham*, 1 Ves. 53.

(a) Newl. Har. 117.

(c) Sic Arg. *Earl of Kildare v. Sir M. Eustace*, 1 Vern. 421. As to the origin of the Sequestration, see *Hyde v. Petit*, 1 Ch. Ca. 91.

rather seems they were first adopted in the time of his Predecessor, *Lord Coventry*. *North*, in his entertaining life of the *Lord Keeper Guildford*, says, that "*Sequestrations* were not heard of till the *Lord Coventry's* time, when *Sir John Read* lay in the *Fleet* (with 10,000*l.* in an iron Cash-Chest in his Chamber) for disobedience of a Decree, and would not submit and pay the Duty. This being represented to the Lord Keeper, as a great contempt and affront upon the Court, he authorized men to go and break up his iron Chest, and pay the Duty and Costs, and leave the rest to him, and discharge his commitment. From thence," says *North*, "came *Sequestrations*, which now are so established as to run of course, after all other process fails, and is but in nature of a grand Distress, the best process at a Common Law, and after a Summons, such as a *Subpoena* is; what need," he observes, and with some reason, "all that grievance and delay of the intervening Process (*d*)?"

Sequestrations are either upon *Mesne Process*, or after a *Decree*. We shall only consider here, *Sequestrations* upon *Mesne Process*.

The Service of an Order of *Sequestration Nisi* upon the Clerk in Court is sufficient (*e*), if the Plaintiff has tried in vain to serve it personally (*f*); but it seems the absolute Order requires personal Service (*g*).

*A *Sequestration* goes only where a Party is in the [*206 Custody of the *Warden of the Fleet*; being in the *King's Bench*, or the Custody of the Sheriff (*h*), is not sufficient; but the Party must first, by *Habeus Corpus*, be committed to the *Fleet*.

If a Defendant is a Prisoner in the *King's Bench* Prison under a criminal Prosecution, he may be brought up by *Habeus Corpus*, and turned over to the Prison of the *Fleet*, *pro forma*, (to ground an Order for a *Sequestration*) and be from thence, carried back to the *King's Bench*, with his cause, and immediately a *Sequestration* may be moved for and obtained (*i*).

A *Sequestration* affects the personal Estate, and the Rents and Profits of the real Estate, but not the Land (*k*), and it binds from the time of awarding the Commission, and not merely from the execution of it (*l*).

Under a *Sequestration* upon *Mesne Process* (*m*), as in respect of a Contempt for want of Appearance or Answer, the *Sequestrators* may take possession of the Party's personal Property, and

(*d*) *North's Life of Lord Keeper Guildford*, 2 vol. p. 73. octavo edition.

(*e*) 3 Anstr. 647.

(*f*) *Marquis of Lothain v. Garforth*, 5 Ves. 113.

(*g*) 3 Anstr. 647.

(*h*) *Markham v. Wilkinson*, 2 Anstr. 579. *Kinsey v. Yardley*, 1 Dick. 265.

(*i*) *Bowes v. Strathmore*, 2 Dick. 711.

(*k*) *Hyde v. Greenhill*, 1 Dick. 107.

(*l*) *Burdett v. Rockley*, 1 Vern. 153.

(*m*) See Form of an order for a *Sequestration* for not paying costs pursuant to an order, 1 Cox, 194.

keep him out of possession, but no *Sale* can take place (n), unless, perhaps, to pay the Expenses (o); for this Process is only 207*] to *form the foundation of taking the Bill *pro confesso*. After a Decree it may be sold (p). Whether Sequestrators can seize the Books and Papers, &c. of a Corporation, is doubtful (q).

Sequestrators have been directed to receive a Pension to A. and his Assigns, payable at the Treasury in the hands of the Assignee.

Dividends of Bank Stock, being choses in Action, cannot be sequestered (r).

Perishable Commodities, however, or Rents, paid in kind, the natural produce of a Farm, taken under a Sequestration, will, on Motion, be ordered to be sold, but there should be notice of the Motion (s).

The salary of an Equerry to one of the Royal Family is not a subject of Sequestration (t); nor can a *Debt*, it seems be taken (u).

Where, after a Sequestration on Mesne Process, and notice of the same to the Party's Banker, the Monies in such Banker's hands were paid to the Party, it has been questioned whether by such payment they render themselves liable for the amount (x).

Sequestrators, it seems, may break Locks (y). In some cases, where Doors were locked and admittance refused to Sequestrators, the Court has ordered a *Writ of Assistance* in order to put 208*] the Sequestrators in *Possession (z). A mistake in the Title of an Order for Sequestration, though executed, has been allowed to be amended (a).

A Sequestrator is not entitled to a stated Fee of 6s. 8d. a day for his trouble, but, as it seems, what the Master considers as sufficient for his trouble (b).

If a Defendant, having *Privilege of Parliament*, neglects to

(n) Hales v. Shafto, 3 Bro. C. C. 72. S. C. 1 Ves. p. 86; and 2 Cox, 224.

(o) Hales v. Shafto, 1 Ves. jun. 86. S. C. 2 Dick. 711; but see Knight v. Young, 2 Ves. & Bea. 184, and note (b). Heather v. Waterman, 1 Dick. 535. Rowley v. Ridley, 2 Dick. 622; and see Simmonds v. Lord Kinnaird, 4 Ves. 735, where the point was considered, but not decided.

(p) Crawley v. Clarke, 3 Bro. C. C. 372.

(q) Lowton v. Mayor, &c. of Colchester, 2 Meriv. 397.

(r) McCarthy v. Goold, 1 Ball & Beatty, 387.

(s) Mitchel v. Draper, 9 Ves. 208. See contra Wilcocks v. Wilcocks, Amb. 421.

(t) Fenton v. Lowther, 1 Cox, 315.

(u) Ibid.

(x) Simmons v. Lord Kinnaird, 4 Ves. 747.

(y) Lowton v. Mayor of Colchester, 2 Meriv. 397.

(z) See Registers Statement of the Practice, 2 Dick. 695, and the Cases there cited.

(a) Lowton v. Mayor of Colchester, 2 Meriv. 395, 398, 400.

(b) Wood v. Freeman, 3 Atk. 542.

put in an Appearance, the Court, on a return of Process of Sequestration, may appoint a Clerk in Court to enter an Appearance for him (c).

When a Party is taken upon any of the Processes, he must pay the costs, and either give his bond, with Sureties for his Appearance, or enter his Appearance with the Register (d).

If a Party be in custody for a Contempt, and Detainers are lodged against him, a discharge from the Commitment under the Contempt will not discharge the subsequent Detainers (e).

When the Defendant is taken upon an Attachment, or any succeeding Process, and continues to refuse to enter his Appearance, a Writ of *Habeas Corpus* may, on Motion or a Petition, be obtained, directed to the Person in whose custody he is, to bring the Prisoner before the Court, to show cause why he refuses; and the Court will order an Appearance to be entered, and commit the Party (f). If no return is made to the *first Writ, an *alias*, and afterwards a *pluries*, may be ob- [*209 tained (g).

If a Defendant is taken upon an Attachment for want of an Appearance, and the Sheriff returns *cepi Corpus*, but by reason of the Defendant's weak state of Health, extreme infirmity, and the peril of her Life, he did not remove her, a Messenger will be ordered (h).

If there be two Defendants, and one of them does not appear, and the whole line of Process runs against him, it is equal to the proceeding to outlawry at common Law, and proceedings may be had against the other Defendant (i).

The Defendant a prisoner in York Gaol, and the demand so trifling it would not bear the expense of removing him by *Habeas Corpus* to the Fleet, it was moved, to save the expense, that for want of Appearance, the Bill might be taken *pro Confesso*; but the Court refused to do it in that summary way (k).

Formerly, by the King's Demise, all Process of Contempt not executed was determined, so that the Party was obliged to begin again at an Attachment; but where any Process was executed, and a *cepi Corpus* returned, the process stood good (l); but now, by the Statute, all Process remains unaffected.

Where a Corporation are Defendants, and they refuse to appear, no attachment is issued, but as a *Distringas*,* as be- [*210 fore observed, and if necessary, an *alias* or *pluries distringas*, and afterwards a Sequestration (m).

(c) See 45 Geo. 3, c. 124, s. 4. Read v. Philips, 16 Ves. 436.

(d) Newl. Har. 120.

(e) Ex parte Dumbell, 10 Ves. 328.

(f) Batson v. Maybe, 1. Price, 63, note (g).

(g) Newl. Har. 124.

(h) Miles v. Lingham, 7 Ves. 230.

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(i) Vanison v. South Sea Company, 1 Ves. 395; and see Philips v. Duke of Buckingham, 1 Vera. 227. Downes v. Thomas, 7 Ves. 206.

(k) Anon. 3 Atk. 696.

(l) Anon. 1 Vera. 380.

(m) Newl. Harr. 149, 150.

By the 5th Geo. 2. c. 25, where a person does not enter an Appearance within the usual time *after a Subpœna issues*, and is justly suspected to *abscond*, to avoid the process, the Court, out of which such process issues, is authorized to fix a day for his appearance, to be inserted in the *London Gazette*, and published on the Lord's Day in the Parish Church of the Defendant; and a Copy of the Order of the Court is to be posted up at some public place at the Royal Exchange in *London*; and on the Defendant's not appearing in the time limited by the Court, the Court may order the Plaintiff's Bill to be taken *pro confesso*, his Effects or Estates to be sequestered, and the Plaintiff's Demand to be satisfied out of the Estate or Effects so sequestered. There was a doubt whether this Act extended to Bills of Review; but it is settled that it does (n).

If the Minister of the Parish prevents an order for the Defendant's Appearance being published pursuant to this Act, he is indictable for a Contempt (o).

The eighth Section of the Act requires an affidavit that the Defendant had been in the Kingdom within two years before the Subpœna issued; but where a Person had been abroad upwards of two Years, and had been outlawed, a motion was allowed upon the Equity of the Statute, that the Defendant should 211*] appear to the Subpœna within a limited time, *upon an Affidavit that the Defendant continued abroad to avoid Process (p).

An Order has been made under this Act for the Defendant to appear, notwithstanding a Subpœna had been served (q), and an Attachment issued, the Party absconding to avoid the Attachment (r).

In a Case where an Order had been obtained pursuant to the Act, but the Parish Church being under repair it could not be published in the Church as directed by the Act, another motion was made, and granted, to fix another day for the Appearance of the Defendant (s).

Motions.

BEFORE we proceed to the consideration of particular Motions, it may be proper to make some observations on Motions in general.

It is very observable, that in no stage of a Suit can any thing be obtained on Motion which forms part or the whole of the Re-

(n) Anon. 3 Atk. 690.

(o) Burton v. Matton, 2 Atk. 114.

(p) Anon. 2 Ves. jun. 188. Sed vid. Neale v. Norris, 5 Ves. 1.

(q) Mawer v. Mawer, 1 Bro. C. C. 388, 9.

(r) Goddard v. Pritchard, 2 Dick. 662.

(s) Knowles v. Broom, 1 Ves. & Beames 305. Wilkinson and Coher, 1 Dick. 74.

lief prayed by the Bill, for that would be determining the Cause on Motion (t).

Motions are made in all stages of a Suit, and are either *special*, or of course. A Special Motion is made in Court, *ore tenus*, after two days previous notice in writing to the opposite Party, or his Clerk in Court, of the Motion, and may be opposed, if *there be a sufficient ground of opposition. A Motion of [*212 course, is made in Court, but without any previous notice, and cannot be opposed.

If a Plaintiff be arrested on his return from attending a Motion against him in the cause, the Court will, on Motion, examine the Parties personally, the Attorney and the Officer, and discharge him from the Arrest, and from any Detainers (u).

The objects of Motions of course may in general be obtained upon a Petition.

If a special Motion is intended to be made on a *Thursday*, a Notice must be given on the preceding *Tuesday*. One clear day must intervene between the day on which the Notice is given and the Motion made. *Sunday*, is not, for this purpose, accounted as a day. A Notice, therefore, of a Motion given on *Saturday* is not a sufficient Notice for a Motion on *Monday*, but would be good for *Tuesday* (x).

Notices of Motions on behalf of a Party suing *in forma pauperis* must be signed by the Clerk in Court (y).

The first and last days of the Term, and every Thursday in Term, are days set apart for the hearing of Motions; but Motions of course, or such as will not take any great length of time in the argument, are permitted to be made every day in Term at the rising of the Court. The Seal-days appointed before and after every Term are likewise days set apart for Motions; but on Cause or Petition-days, or other *days after Term, [*213 Motions are not permitted to be made at the rising of the Court, as on days for causes in Term; but the Court will, sometimes, in urgent cases, give leave to move, and appoint a day (z) for that purpose.

Though the next day after the last day of the Term be not, in strictness, part of the Term, and therefore no Motion can then be made on the *Petty-Bag* side, yet as to other purposes it is part of the Term, and Notices given of Motions the last day of the Term, may be moved at the Rolls the day after (a).

A motion, however, the day after the Term, to dismiss a Bill for want of Prosecution, on a Certificate that there had been no

(t) Lord Oxford v. Scott and Smith,
26 June 1808, MS. Forrester v. Pas-
tingham, 11th and 24th July 1804, MS.
Like v. Beresford, 3 Bro. C. C. 366.
(u) Bromley v. Holland, 5 Ves. 2.

(x) Maxwell v. Phillips, 6 Ves. 146.
(y) Gardiner. v. ——— 17 Ves.
387.
(z) Turn. & Ven. Pract. 2 vol. 583.
(a) Anon. 1 P. Wms. 522.

Prosecution within three Terms, of which the last Term was one, was denied (b).

Though the Seal last three days it is considered as a continuance of the first day (c); nor, strictly, can any Motion be made which was not put into the Counsel's hands at least on the first day of the seal. If a Party is not in a situation to move on the first day of the Seal, he cannot move on the subsequent days such Seal is continued (d).

It was formerly a Rule, and a very oppressive one, that a Party was at liberty to give and abandon three Notices of Motion without paying Costs (e). If, however, the motion was heard, and stood over, and another Notice of Motion was given and 214*] abandoned, the *Party was liable to the Costs of both Motions (k); but now, by a *general Order*, 10th March 1818 (i), if a Notice of Motion be given, but no Motion is made, the Party giving the Notice pays 40s. Costs where no affidavit has been filed; and where an affidavit is filed by either Party, he pays Costs, to be taxed by the Master. Nor can the Motion be renewed until the Costs of the former Notice of Motion are paid (k).

The Motion, it seems, for Costs under this Act, should be made on the next Motion-day after the day for which the Notice of Motion was given.

If a Motion be made, and granted, on a *false suggestion*, it will, on application, be discharged for irregularity, with forty shillings Costs (l).

Where Notice of a Motion is necessary, every thing the party moves for should be expressed, for the Court will not, in general, extend the Order beyond what is comprehended in the Notice (m).

The Costs of a Motion, for instance, are not given unless they are mentioned in the Notice of Motion (n).

All *Affidavits* upon which Motions are founded ought to be filed so long before the Motion as that the other Party may have time to take a Copy (o); but it is no objection to a Motion that the Affidavit was only filed the day before, if it is an 215*] Affidavit that *cannot be answered, as, that the Plaintiff cannot go to Trial with safety till the Answer comes in (p).

(b) *Ibid.*

(c) *Ibid.*

(d) *Sharp v. Ashton*, 2 Ves. & Bea. 412. S. P. Anon. 26th March 1803, MS.

(e) *Shelly v. Shelly*, 8 Ves. 316. *Anderson v. Palmer*, 14 Ves. 151. *Practical Register*, (Wyatt's edit.) 287.

(h) *Whitecombe v. Minchin*, 1 Wilson, C. C. 1.

(i) 3 Madd. Rep. 318.

(k) *Bellchamber v. Giani*, 3 Madd. Rep. 550.

(l) *Harding v. Cox*, 3 Atk. 583.

(m) 2 Turn. & Ven. 683, who cite *Pract. Reg.* 287.

(n) *Mann v. King*, 18 Ves. 297.

(o) *Newl. Harr.* 400. Turn. & Ven. 2 vol. 546.

(p) *Jones v. —*, 8 Ves. 46.

Whoever produces an Affidavit of a Person, to contradict a former one made by such Person, should produce him in Court, a personal examination being required (q).

Affidavits taken before a *Solicitor in the cause*, cannot be read (r); but it seems necessary to have an Affidavit of the fact, because there may be another Attorney of the same name (s).

Affidavits may be referred for *Impertinence* (t). So, also, Affidavits in a Cause, or in Bankruptcy (u), or in Lunacy (x), will be ordered to be taken off the File, if *irrelevant* and *scandalous*; and Costs will be given as between Attorney and Client. And this will be ordered, if necessary, by the Court itself, without any special application for that purpose; but if the scandalous matter has been answered, the Court will not order it to be expunged (y).

Motions may be classed under three Heads; 1. Those made after the Filing of the Bill, and before an Answer. 11. Those made after an Answer, and before a Decree. 111. Those made subsequent to a Decree.

*1. MOTIONS AFTER BILL FILED, AND BEFORE ANSWER. [*216

1. *Motion for an Injunction.*

THE Principles of the Court as to *Injunctions* have been considered in the preceding volume (z).

In general, if the Bill does not pray an Injunction, the Plaintiff cannot move for the same under the prayer for general relief (a); but if, after a Decree for an Account under a Bill for Foreclosure, the Mortgagor attempts to cut Timber, the Court will enjoin him, though there is no prayer for that purpose; and where upon the contested construction of a Will, a Party was declared to be Tenant for Life, he was, on Motion, restrained by Injunction from cutting Timber (b).

An Injunction, as before observed, will, in urged cases, be granted upon *Petition and Affidavit* before the Bill is filed. It is often done in Vacation; but on such Petition an Injunction only can be ordered, for the Chancellor cannot direct any thing to be done by the Defendant upon the Petition (c). Some doubt

(q) Ex parte Lord, 2 Ves. 26.

(r) In re Hogan, 3 Atk. 812.

(s) Hodgson v. Walker, 1 Wight.

(t) Phillips v. Phillips, 3 Atk. 391.

(u) Sampson ex parte, 15 Ves. 477.

(x) Erskine v. Garthshore, 18 Ves. 114.

Anon. 3 Ves. & Bea. 93.

(z) Le Heup ex parte, 18 Ves. 221.

(y) Ibid. 225.

(z) 1 vol. p. 125, &c.

(a) See Savory v. Dyer, Ambl. 70.

(b) Wright v. Athyns, 1 Ves. & Beames, p. 314.

(c) Mayor of London v. Bolt, 5 Ves.

130; and see Nichols v. Kearsley, 2

Dick. 645. Chamberlayne v. Dum-

mer, 2 Dick. 645. S. C. 3 Bro. C. C.

476.

appears to have been expressed whether an Injunction can be obtained upon Petition at the Rolls (*d*).

217*] *In cases where irreparable mischief may be done, as in cases of Waste (*e*), and, perhaps, in a plain case of nuisance (*f*), an Injunction will immediately be granted.

So, where there has been an infringement of *Copy-Right*, or where the Proprietors of new Inventions under Letters Patent, file a Bill for an Injunction to stay other persons from infringing upon their Patent, the Court will grant an Injunction on the filing of the Bill, and before the Answer comes in, on Affidavit and Certificate (*g*).

So, in cases of quieting Possession, before the hearing, to a Party who has had the same three Years; on a Bill brought upon a forcible Entry, an Injunction, it seems, will be granted till Answer, on a Bill filed, and Affidavits. Where, also, an insolvent Executor is getting in the Assets before Probate, the Court will restrain, and direct the Money to be paid into the Bank, till Answer and further Order (*h*).

So if a Note be obtained at play (*i*), or be given for procuring a Marriage, an Order may be obtained on a Bill filed, and Affidavit, to restrain the Party from assigning or indorsing it over (*k*). In other similar cases, an Injunction has, in like manner, been granted (*l*).

218*] *To obtain an Injunction in cases of Waste, it must appear to be a case of *irreparable Mischief* to a Person who swears to his Title: *Information and belief* as to Title will not do (*m*): there must be positive evidence of actual Title (*n*). Nor is it sufficient to swear you are *credibly informed* the Defendant intends to commit Waste, but it must be proved either that he had laid the axe at the root, or some Person must swear he threatened to do it (*o*).

Though no Injunction be obtained on the original Bill, and the Answer is put in, yet if the Plaintiff *amends* his Bill, he may obtain the common Injunction for want of an Answer (*p*); but in such case, it had previously been decided by the same Judge, that an Injunction will not be granted on an *amended* Bill and

(*d*) *Garlick v. Pearson*, 10 Ves. str. 851. and the cases there cited, 3 452. Bro. C. C. 376.

(*e*) 1 Ves. 476. 3 Bro. C. C. 376.

(*f*) *Attorney-General v. Doughty*, 2 Ves. 453; but see *Attorney-General v. Cleaver*, 18 Ves. 211.

(*g*) *Lowther v. Hamper*, 3 Atk. 496. *Patrick v. Harrison*, 3 Bro. C. C. 376.

(*h*) See *Patrick v. Harrison*, 3 Bro. C. C. 376; and see *Cutlett v. Smith*, mentioned in *Newl. Har.* 543.

(*i*) ——— *v. Blackwood*, 3 An-

(*k*) *Smith v. Aykwell*, 3 Atk. 566. *Patrick v. Harrison*, 3 Bro. C. C. 376.

(*l*) See 5 Ves. 129.

(*m*) *Davis v. Leo*, 6 Ves. 787. *Whitley v. Whitley*, 1 Bro. C. C. 57.

(*n*) *Ibid.*

(*o*) *Hanay v. M'Entire*, 11 Ves. 55; and see *Hanson v. Gardiner*, 7 Ves. 309.

(*p*) *Barnardiston*, 322. *Nelthorpe v. Law*, 13 Ves. 323.

affidavit, unless some new fact, which the Plaintiff did not know when the original Bill was filed, is brought forward, particularly, where the Defendant is abroad (q).

In general, an Injunction is not granted on a Bill and Affidavit to stay proceedings at Law until the Defendant prays a *De-dimus*, or is in *Contempt* (r), or though not actually in Contempt, is in default for not answering (s); nor can such Injunction be had in the first instance, except where the Party has not had an opportunity of obtaining the common Injunction; as upon Judgments entered up upon Warrants of *Attor. [*219 ney (t). The common Injunction is first obtained, and then a Motion may be made to extend it, to stay Trial (u); but both Motions cannot be made at the same Seal (x); and therefore, where the time of the Defendant's Appearance was the day for which Notice of Trial was given, it was held the Trial could not be stayed (y). So where the Commission-day at the Assizes was the 7th March, and the Motion to stay Trial was on the 3d, it was refused (z)†

Nor will an Injunction be extended to stay Trial at Law for want of an Answer, unless it is supported by an Affidavit, in which the Plaintiff states his belief that the Answer will give a Discovery material to his Defence at Law (a); but a slight Affidavit has been held sufficient, it not being necessary that the Affidavit should be particular as to the discovery expected (b). A trial will be staid till Answer, though the Defendant be resident in the *East Indies*: but in such case special ground must be stated in the Affidavit to show that the Discovery is material (c).

In those cases where an Injunction is obtained merely upon an Affidavit and Certificate of the filing of the Bill, without any *Subpœna* served, the Plaintiff *is considered as having waived his right to an Answer, and it is competent to the Defendant to apply to the Court to dissolve the Injunction upon the merits disclosed by Affidavit (d).

Injunctions, unless issued upon a *special application* after a

(q) *Norris v. Kennedy*, 11 Ves. Rep. 102. S. C. on Appeal, 1 Swanst. 565.

(r) *Anon.* 2 Freem. 6.

(s) *James v. Downes*, 18 Ves. 522. *Vipan v. Mortlocke*, 2 Meriv. 476.

(t) *Franklyn v. Thomas*, 3 Meriv. 226, 6, and *Annesley v. Rookes*, mentioned in note (a) to p. 226.

(u) 3 Bro. C. C. 87. *Garlick v. Pearson*, 10 Ves. 450. *Bishton v. Birch*, 2 Ves. & Bea. 41.

(x) 10 Ves. 451.

(y) *Wright v. Brains*, 2 Cox, 232. S. C. Bro. C. C.

(z) *Field v. Beaumont*, 3 Madd.

(a) *Appleyard v. Seton*, 16 Ves. 223. *Hartley v. Hobson*, 2 Dick. 728. Sic dict. *Bishton v. Birch*, 2 Ves. & Bea. 41.

(b) *Farrar v. Lewis*, 2 Dick. 729. *Nelthorpe v. Law*, 13 Ves. 324.

(c) *Rivet v. Braham*, 2 Bro. C. C. 641. S. C. cited from MS. Newl. Harr. p. 516.

(d) *Attorney-General v. Nichol*, 16 Ves. 340. *Vipan v. Mortlocke*, 2 Meriv. 479.

Bill filed and Affidavits, can only be obtained upon the Defendant's Answer, or upon an order for time to answer, or an Attachment sealed, for want of an Answer (e) sworn and filed (f).

But an Injunction upon an *Attachment* or a *Dedimus*, or upon the Defendant's *praying time*, though it stays proceedings at Law, does not stay proceedings in the *Spiritual Court*: for that purpose a *special motion* is necessary; and it has been doubted, whether the same rule does not hold with regard to proceedings in the Court of *Admiralty* (g).

If an Injunction is obtained *before* a Declaration, the Injunction stays every thing, and prevents the delivery of a Declaration (h); if *after* a Declaration the Injunction stays execution only, and not trial. When a Motion is made to stay Execution the Plaintiff cannot, at the same seal, move for a special Injunction to stay trial (i).

In the Court of *Exchequer* an Injunction stays all further proceedings, whatever state the cause may be in (k).

221*] *The Court will not, before Answer, restrain proceedings on a *Judgment* (l), unless it be for want of an Answer, in which case, if the Defendant be abroad, the Money will, on an Affidavit contradicting the allegations in the Bill, be ordered to be paid into Court, or the Injunction dissolved (m). Where an Injunction is obtained against proceedings at Law till the coming in of the Answer of one Defendant who resides abroad, the Plaintiff is not compellable to bring the Money into Court, unless under special circumstances (n).

If a Plea (o), or Demurrer, be put in, an Injunction cannot be obtained till their sufficiency is decided; and for this reason applications are frequent to have a Plea (p) or a Demurrer, argued out of its course, because it prevents an Injunction (q); but the circumstance must be very special to obtain such indulgence; and if the cause has been unnecessarily protracted, the Court, it seems, will not advance the Plea or Demurrer (r).

If, however, in such case the Demurrer is over-ruled, the Court will place the Defendant where he would have been put for such untenable defence.

(e) Vid. *Cousins v. Smith*, 13 Ves. 166, 7. 3 Atk. 496. 2 Ves. 121, 453. 3 Anst. 645.

(f) *Bruce v. Webb*, 2 Meriv. 174.

(g) *Anon.* 1 P. Wms. 301. S. P. 1 Dick. p. 223.

(h) *Mills v. Corby*, 1 Meriv. p. 4.

(i) *Garlick v. Pearson*, 10 Ves. 450; see also *Wright v. Braine*, 3 Bro. C. C. 87.

(k) *Nelthorpe v. Law*, 13 Ves. 324.

(l) *Lane and Williams*, 6 Ves. 798.

(m) *Culley v. Hickling*, 2 Bro. C.

C. 182, and the cases cited in the note; and see *Acton v. Market*, 2 Bro. C. C. 14, and *Sherwood v. White*, 1 Bro. C. C. 452. *Potts v. Butter*, 1 Cox, 330.

(n) *Sholbred v. Macmaster*, 1 Anst. 366.

(o) *Humphreys v. Humphreys*, 3 P. Wms. 396.

(p) *Anon.* 2 Atk. 113.

(q) 2 P. Wms. 396.

(r) *Jones v. Taylor*, 2 Madd Rep. 181.

Thus, where the Defendant (Plaintiff at law) subsequently, on the day when the common Injunction might otherwise have been obtained, put in a *Demurrer, which was over-ruled, and in the mean time, pending the Demurrer, the Plaintiff was taken in execution; after which, and immediately on the over-ruling of the Demurrer, the common Injunction was obtained; upon an application to discharge the Plaintiff out of custody, on the ground, that the Demurrer being over-ruled the Parties are entitled to be replaced in the situation they would have been in, if no Demurrer had been filed, and by analogy to the case of goods taken in execution; the application being opposed on the ground that the Parties would not, by granting it, be placed in the situation in which they would otherwise have stood, since the judgment had been satisfied by the taking in execution, and, if now discharged, the Debt would be gone; the Court ordered that the Plaintiff be discharged, on undertaking again to confess Judgment, so that he might not afterwards say the existing judgment and Debt had been satisfied by the Execution from which he was so discharged (s).

An Injunction obtained *before the commencement* of an Action prevents the Defendant bringing his Action and arresting the Plaintiff; and though, after an Action commenced the Defendant to the injunction Bill may call for a plea, and proceed to Judgment at Law, yet if Bail are excepted to before the Injunction is served, and after the Injunction the Sheriff is ruled to bring in the body, this has been held to be a breach of the Injunction (t). Where *Bail is put in above, an Injunction to stay proceedings against the Principal extends to proceedings against the Bail. Where Bail is only put in below, such an Injunction extends to proceedings on the Bail-bond (u). Attaching and receiving Money levied by the Sheriff, though levied before the Bill is filed, is, it seems, a breach of the Injunction: it would be otherwise if the Sheriff had paid it *voluntarily* (x).

If an injunction is obtained on a Bill filed after execution executed, the Goods not yet being out of the hands of the Sheriff, and the Sheriff proceeds to sell without process, he will be ordered to pay the Money into Court. Formerly the practice

(s) *Franklyn v. Thomas*, 3 Meriv. 225.

(t) *Bulley v. Ovey*, 16 Ves. 141; and see *Leonard v. Attwell*, 17 Ves. 385, and *Chaplin v. Cooper*, 18 Ves. 19. It was said Arg^o. that an action is commenced by delivery of a Declaration to a Defendant, but that a Declaration *de bene esse* is not the commencement of an action, *Ibid.* p.

143. See *Sidney v. Hetherington*, 3 P. Wms. 148, in note.

(u) *Stone v. Tuffin*, Ambl. 32.

(x) *Axe v. Clarke*, 2 Dick. 549. This, probably, is the case alluded to by Lord Eldon, in *Franklyn v. Thomas*, 3 Meriv. 234, where his Lordship expresses some doubt as to that decision.

was in such case to make the Sheriff a Party to the Suit, but that is now considered unnecessary (y).

Where an Injunction had been obtained in a Suit by an obligor, in a joint and several Bond, to which Suit the Co-obligor was not a party, and afterwards an Execution was issued upon a Joint Judgment, with notice to the Sheriff of the Injunction, and directions not to take the Plaintiff in Equity, it was held not to be a breach of the Injunction (z).

If an Injunction is obtained after an interlocutory Judgment (as by Default, or on Demurrer) the Plaintiff may go on to ascertain his damages, all the Court intending to stop being the 224*] execution. The *Plaintiff at Law is allowed to proceed so far as that he may be at liberty, *eo instanti*, that the Injunction shall be dissolved, to take out Execution; nor is it a breach of an Injunction to sue out, where necessary, a *scire facias* (a).

If an Injunction has been improperly granted, the Defendant ought to apply to the Court to alter the terms of the Injunction, but he is not justified in disobeying it (b); and such was the doctrine in the time of Lord Nottingham (c).

Service of a copy of the Injunction on the Defendant, or on his Attorney or Solicitor, or their clerk, is good service (d); and it has been held, that it is unnecessary to deliver the original to the Party to examine the copy by, though required so to do (e).

Where an Order was made for the taxation of a Solicitor's Bill, and for staying all proceedings at Law until after the Master's Report, and the Solicitor died pending the taxation, and before any Report, and no revived order for taxation being made, the Solicitor's personal Representative proceeded at Law against the Client, and it was held that this was not a Contempt (f).

If the Injunction be to *restrain an act*, and there is a breach of the Injunction, a Motion may be made that the Defendant 225*] shall stand committed. The *Defendant must be personally served with Notice of the Motion (g); but if he is present in Court when the Order is pronounced, he is instantly a Prisoner, and the Warden may take him directly to gaol. A Party may be arrested on a Sunday, on a Warrant of commit-

(y) Franklyn v. Thomas, 3 Meriv. 234, 5.

(z) Chaplin v. Cooper, 18 Ves. 16.

(a) Morrice v. Hankey, 3 P. Wms. 147.

(b) Marquis of Downshire v. Lady Sandys, 6 Ves. 109, 110; and see statement of the register as to the practice, 2 Dick. 703. *Sed. vid. contra*.

(c) Woodward v. King, 2 Ch. Ca. 203. S. C. 2 Dick. 797.

(d) Newl. Har. 546.

(e) Woodward v. King, 2 Ch. Cas. 203. Serjeant Maynard, the Reporter, seems not to have been satisfied with the decision.

(f) Houldich v. Houldich, 1 Wilson, C. C. 17.

(g) Angerstein v. Hunt, 6 Ves. 438.

ment (h). When the Injunction is to do a thing, in general terms, an Order must be obtained that the Party shall do it by a particular day, or stand committed (i).

If a Defendant or his Attorney were present when an Order is made for an Injunction to stay proceedings at Law (k), or, if the Defendant was present during the Motion for the Injunction, though not when the Order was made (l), and notwithstanding, the Defendant proceeds at Law, it will be considered as a Contempt, though the Injunction was not sealed; and this doctrine has since been extended to the case of Notice of the Injunction, by information (m); but a Party proceeding in the Action will not be committed for a contempt, if the Order for the Injunction is not drawn up after a considerable lapse of time, three or four months, for instance (n). Where, for want of an Answer, an Injunction issued to restrain the Defendant from all proceedings at Law against the Plaintiff or an Award for payment of Money, and the Award having been made a Rule of the Court of King's Bench, the Defendant applied to that Court for an Attachment for non-performance of the [*226 Award, and obtained a Rule to show cause, this was held not to be a breach of the Injunction, the Attachment not being executed (o).

When the common Injunction has been dissolved upon the coming in of the Answer, and the Bill has been subsequently amended, the Injunction may be revived upon a special application, supported by an Affidavit of the facts stated by way of amendment, and the Defendant being in default (though not in contempt) for not answering the amended Bill (p).

2. Motion for a Writ of Ne Exeat Regno.

A Writ of Ne Exeat issues for the purpose of obtaining Security for a demand from a person, intending, whatever may be the cause (q), to leave the country, when the other Party has not a legal remedy, and cannot hold him to bail (r).

This, which is a State Writ to restrain the people from going abroad, has been extended by usage to a purpose much beyond the original intention of it. At first it was employed to hinder the Clergy from going to Rome; it was afterwards extended to Laymen, machinating and concerting measures against the State,

(h) Ex parte Whitchurch, 1 Atk. 55, 57.

(i) Angerstein v. Hunt, 6 Ves. 488.

(k) Anon. 3 Atk. 567; and see Skip v. Harwood, ibid. p. 565. Osborne v. Tenant, 14 Ves. 136.

(l) James v. Downes, 18 Ves. 524.

(m) Kimpton v. Eve, 2 Ves. & Bea. 350.

(n) James v. Downes, 18 Ves. 524, 5.

(o) Franco v. Franco, 2 Cox, 420.

(p) Vipan v. Mortlocke, 2 Meriv. 476.

(q) Anon. MS.

(r) Swift v. Swift, 1 Ball & Beatty, 327.

and has at length been applied to prevent a subterfuge from the justice of the Nation, though in matters of private concernment, in order to get Bail for an equitable demand, upon Affidavit of an intention to go abroad. The legality of this last application 227*] of *the Writ was settled in Charles the Second's time, upon an Usage first begun in the time of James the First (s); and was afterwards so fully established, that the granting of it was considered by the *Lord Keeper Wright*, as a matter of right (t).

This Writ, which is thus applied at the discretion of the Chancellor, in *Civil* cases (u), is never granted without great consideration; particularly where Foreigners are concerned (x); for it is a severe process (y), depriving the subject of his Liberty. "I never apply it," says *Lord Eldon*; "without apprehension (z)." The Court of Exchequer cannot direct a Writ of *Ne Exeat Regno*; but that Court grants an Order in the nature of a *Ne Exeat Regno*, that the Party should give Security (a).

The mode of obtaining a Writ of *Ne Exeat* is by filing a Bill, containing a prayer for the Writ; but if after a Bill filed the Plaintiff has reason to think the Defendant will go abroad, he may move to amend his Bill, and pray a *Ne Exeat*; and notice of such Motion is unnecessary (b).

It is a Rule that a Writ of *Ne Exeat* is issued only upon a certain (c), equitable, money (d) demand: at the instance of a 228*] Plaintiff who shows a Title to *sue (e). One exception to the Rule, is, where there has been a *Decree* in the Ecclesiastical Court for *alimony* and Costs (f); but before such a Decree, the Bill will not lie (g); and the Writ will be marked only for the arrears actually due (h).

And where the balance of Account is admitted, there (another exception to the general rule) though Bail may be had at Law, yet may a Writ of *Ne Exeat* issue, marked for the amount

(s) 1 Chan. Cas. 115. Read v. 1795, mentioned in note 1, to 2 Vern. Read, 2 Chan. Cas. 245. Wilmot's 435.

Rep. 97, 98. Bacon's Tracts, 295. (c) Anon. 1 Atk. 521.
(d) Cock v. Ravier, 6 Ves. 284;
Anon. 1 Atk. 521. 3 P. Wms. 312, in note. De Carriere v. De Calonne, and see De Carriere v. De Calonne, 4 Ves. 500, 1. Cock v. Ravier, 6 Ves. 284. 4 Ves. 591.

(e) Swift v. Swift, 1 Ball & Bea. 326.

(f) Pract. Reg. 289. Wyatt's edition.
(g) Read v. Read, 1 Ch. Ca. 115.
(h) 4 Ves. 590, 1. 2 Ch. Ca. 145. 2 Ventr. 345. Ex parte Whitmore, 1 Dick. 143. Anon. 2 Atk. 210. Pearne v. Lisle, Amb. 76. Shaftoe v. Shaftoe, 7 Ves. 171. Dawson v. Dawson, ibid. 173. Oldham v. Oldham, 7 Ves. 410.

(i) 1 Ball & Beatty, 328.
(j) 1 Ves. and Bea. 373.
(k) Coglar v. Coglar, 1 Ves. jun. 94. Shaftoe v. Shaftoe, 7 Ves. 172.
(l) Ex parte Bellett, 1 Cox, 300; and see 11 Ves. 46, 7.

(m) Nisbett v. Murray, 30th April, (n) Haffey v. Haffey, 14 Ves. 261.

of the admitted balance (i) ; because, being matter of Account, the Court has a concurrent Jurisdiction (k).

It has been held, a Writ of *Ne Exeat* may be obtained on behalf of a Lunatic, by his Committee, on a Note given for the Balance of an Account, restraining the Captain of an *East India Ship* from proceeding on his Voyage (l).

The Writ is usually directed to the Sheriff, to make the Defendant find sufficient Surety that he will not depart the realm without the order of the Court, and on his refusal to give such Bail or Surety to the Sheriff, to commit him to prison (m).

In order to obtain the Writ, application should be made as promptly as possible, and the Plaintiff must swear *positively* that the Defendant is going abroad, *or to some declaration of [*229 his, that he is. It is not sufficient to swear that another Person said so (n).

The Affidavit must be as *positive* as to the *equitable* Debt, as an Affidavit of a legal Debt must be, to hold to Bail. Swearing to Information and Belief will not do (o), except where it is matter of *Account*, as in the case of Partners and Executors (p), or in cases of *Bankruptcy*, where the Bankrupt swears *positively*, and the Assignees as to their belief (q).

The Affidavit must also state the facts on which the Debt arises, and on which it is grounded (r), and that the Debt will be endangered by the Party's going abroad ; but it need not allege that the purpose of going abroad is to avoid the demand (s). A denial by the Defendant by Affidavit, that he is going abroad, will not hinder the effect of the Writ (t).

It has been held that a *Ne Exeat* will not be granted where a Person lives out of the Kingdom, and the transaction was on the faith of having justice where he resided (u).

Though some of the necessary Parties will not join in an Action for a legal demand, a *Ne Exeat* will not be granted (x).

*A *Ne Exeat* will not lie on a Contract for a Purchase, [*230 though there has been part-payment, and Possession taken, and

(i) Jones v. Sampson, 8 Ves. 593.

(k) See Howden v. Rogers, 1 Ves. & Bea. 133. Jones v. Alepsin, 16 Ves. 470. Hannay v. M'Entire, 11 Ves. 54.

(l) Stewart v. Graham, 19 Ves. 313.

(m) Newl. Har. 336.

(n) Oldham v. Oldham, 7 Ves 410. Etches v. Lance, 7 Ves. 417. *Sed vid.* Chapeaurouge v. Carteaux. 8 Ves. 597, in note (a.) where swearing only to information and belief was held sufficient.

(o) Hannay v. M'Entire, 11 Ves. 54. *overruling* Russell v. Ashby, 5 Ves. 99.

(p) Jackson v. Petrie, 10 Ves. 165. Rico v. Gaultier, 3 Atk. 301 ; but see as to cases of account, Amsinck v. Barclay, 8 Ves. 597, and Parker v. Appleton, 3 Bro. C. C. 427.

(q) 18 Ves. 133. 1 Ves. & Bea. 133.

(r) 2 Ves. 489, 8 Ves. 597.

(s) Tomlinson v. Harrison, 8 Ves. 32. Stewart v. Graham, 19 Ves. 313.

(t) 8 Ves. 597.

(u) Robertson v. Wilkie, Ambl. 177 ; and see 76. *Sed vid.* S. C. 2 Dick. 786.

(x) Ex parte Duncombe, 2 Dick. 503.

an Assignment of a Mortgage, if no conveyance has been tendered, nor any verification of the Title by Affidavit (y).

A Writ of *Ne Exeat* may issue to restrain a Person going to Scotland (z), or to Ireland (a).

Upon application for this Writ, no Subpœna is taken out, but upon personal service of the Writ the Defendant is bound to appear in Court, and give Security not to depart the Kingdom. Having appeared, he must put in his Answer, and may then apply to set aside the Writ (b); but if after the Answer he goes abroad without permission, his Sureties will be ordered to pay the Money into Court (c).

The Writ will be discharged if the Party pays into Court the Sum for which the Writ is marked (d), (although in the mean time a larger sum appears to be due) (e), or upon payment of what upon the Answer appears to be due (f), or if he gives Security to answer the Decree (g). The Writ is, in all cases, marked for what is due (h).

It seems, that an application for a *Ne Exeat* may *be [*231 founded on an admission in the Defendant's Answer, the admission answering the purpose of an Affidavit (i).

If a Bill be dismissed with Costs, and the Plaintiff threatens to leave the Kingdom, before the Service of Process to pay the Costs can be made effectual, a Writ of *Ne Exeat* may be obtained (k).

The Writ cannot be obtained on the Affidavit of the *Wife* of the Party (l). It appears, however, that in one case the *Lord Keeper Puckering* granted the Writ upon such Affidavit (m); but the Precedent was not followed by *Lord Ellesmere* (n).

Where a Wife was the Executrix of her former Husband, and her second Husband was gone out of the Kingdom, a *Ne Exeat* was granted against her alone (o).

Where Goods, Chattels, &c. were bequeathed to an Executrix, in Trust for A., and upon an Account settled between them

(y) Anon. MS. and see Raynes v. Wise, 2 Meriv. 472.

(z) Donne's Case, 1 P. Wms. 262. Wilson v. Boswell, 2 Dick. 535. Hunter v. M'Cray, For. 196.

(a) Howden v. Rogers, 1 Ves. & Bea. 129; but see Bernal v. Marquis of Donnegal, 11 Ves. 47.

(b) Russell v. Ashby, 5 Ves. 99. See the remark on this Case in Hanay v. M'Entire, 11 Ves. 55.

(c) Musgrave v. Medex, 1 Meriv. 49. Utten v. Utten, ibid. 51.

(d) Evans v. Evans, 1 Ves. jun. 96.

(e) Baker v. Jefferies, Cox, 226.

(f) Dick v. Swinton, 1 Ves. & Bea. 373.

(g) Atkinson v. Leonard, 3 Bro. C. C. 218. 1 Ves. & Bea. 133.

(h) Shaftoe v. Shaftoe, 7 Ves. 172. Dawson v. Dawson, 6 Ves. 174.

(i) Roddam v. Hetherington, 6 Ves. 95.

(k) Stewart v. Stewart, 1 Ball & Beatty. 73.

(l) Sedgwick v. Watkins, 1 Ves. jun. 11 S. C. 3 Bro. C. C. 11.

(m) Ibid. and see Lake v. Decon, Toth. 158.

(n) Holman v. Audley, Toth. 160.

(o) Jerningham v. Glass, 3 Atk. 409. S. C. Ambl. 62; and see Moore v. Meynell, 1 Dick. 30.

she acknowledged to have 640*l.*, and threatened to go abroad, a Writ of *Ne Exeat* was granted, and marked in 640*l.* (p).

A Writ of *Ne Exeat Regno* cannot be obtained against an Attorney, upon a *legal demand*, on the ground that he is privileged, and cannot be arrested (q).

If a Man has been arrested upon an equitable *demand, [*232 as if it had been a legal demand, and is discharged, he cannot afterwards be taken on a Writ of *Ne Exeat* (r).

3. Motion for a Guardian.

On the filing of a Bill by an Infant, he may immediately, and before the Appearance of the Defendant, move to have a Guardian assigned him (s).

A Plaintiff may also move for an Order to appoint a Guardian for an Infant Defendant (t).

4. Motion for a Receiver.

We have before alluded to several Cases where a Receiver will be appointed, and shall now enlarge on the subject.

A Receiver may be appointed *before*, or *after*, an Answer, if prayed for by the Bill; and *after a Decree* (u), though not prayed for by the Bill, if the Court thinks it necessary. A Motion for a Receiver cannot be made *ex parte*; Notice of the Motion must always be given. As the nature of the Appointment, and the duties of a Receiver, are the same, in whatever stage of the Suit he is appointed, all the doctrine on the subject will here (to prevent repetition) be brought together.

The power of appointing a Receiver is a discretionary Power exercised by the Court with as great utility to the subject as any sort of Authority that *belongs to them, and is provisional [*233 only, for the more speedy getting in of a Party's Estate, and securing it for the benefit of such Person who appears entitled, and does not affect the *right* (x). It does not, for instance, alter the Possession of the Estate in the Person who shall be found entitled at the time the Receiver was appointed, so as to prevent the Statute of Limitations running on during the right in dispute (y).

There is no instance, however, (except in the case of Lunatics and Idiots) (z), of the appointment of a Receiver, unless

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| (p) Taylor v. Leitch, 1 Dick, 380. | (t) Williams v. Wynne, 10 Ves. |
| (q) Gardner v. ———, 15 Ves. | 159. |
| 444. (r) Amsinck v. Barclay, 8 Ves. | (u) See Cooke v. Gwyn, 3 Atk. |
| 594. Raynes v. Wise, 2 Meriv. 472. | 690. |
| (s) Pendleton v. Mackrory, 2 Dick. | (x) Ship v. Harwood, 3 Atk. 564. |
| 736. | (y) 2 Atk. 15. Sharp v. Carter, 3 |
| | P. Wms. 379. |
| | (z) 1 Atk. 578. |

where there has been a Bill filed (a), praying for a Receiver, nor is it usual to appoint a Receiver before Answer; but there are occasions where the Court will, *before Answer*, appoint a Receiver, upon Affidavits, as in cases of *Fraud*, combined with *Danger* to the Property (b); or where a Defendant absconds to avoid being served with Process (c); nor will a Motion for a Receiver be granted against the legal Estate, upon Evidence in a Cause which has not been heard (d).

A Receiver has, by consent, been appointed before Answer, where there was a Devise to four Trustees, of whom two declined to act (e).

234*] *A Receiver has, before Answer, been appointed, upon the Bill of a Purchaser, *pendente lite*, viz. a Suit instituted by the Wife of the Vendor, claiming under a settlement after Marriage, and therefore voluntary (f).

On the filing of a Bill, the Court will, on application, appoint a Receiver of the Rents and Profits of an *Infant's* Estate (g), and this, though no Receiver is prayed for by the Bill (h). It is the same where the Infant's Estate is in Mortgage; a Receiver will be appointed, and although the Mortgagees are not before the Court (i); but, except in the case of an Infant, if a Mortgage appears on the face of the Pleadings, a Receiver will not be appointed unless the Mortgagor is before the Court (k).

Where a Mortgagee is not in Possession the Court will, upon the application of Creditors, appoint a Receiver of the mortgaged Premises, but without prejudice to the right of the Mortgagee to obtain Possession (l). An equitable Mortgagee may apply for a Receiver (m).

A second Mortgagee cannot, in general, have a Receiver if the Mortgagor be living, without the consent of the first Mortgagee (n); but if the Estate is in the possession of the first Mortgagee, and he has been negligent in his Accounts, and cannot

(a) *Ex parte Mountfort*, 15 Ves. 444. *contra Pitcher v. Hellier*, 2 Dick. 580.

(b) *Lloyd v. Passingham*, 16 Ves. 59. S. C. 3 Meriv. 697; and see *Vann v. Barnet*, 2 Bro. C. C. 158. *Huguenin v. Baseley*, 13 Ves. 108, and *Middleton v. Dodswell*, 13 Ves. 266, the case of an Executor. *Duckworth v. Trafford*, 18 Ves. 283. *Maguire v. Allen*, 1 Ball & Bea. 75.

(c) *Maguire v. Allen*, 1 Ball & Bea. 75.

(d) *Lloyd v. Passingham*, 3 Meriv. 697.

(e) *Brodie v. Barry*, 3 Meriv. 695, S. C. on other points, 2 Ves. & Bea. 36, 127.

(f) *Metcalf v. Pulvertoft*, 1 Ves. & Bea. 180.

(g) *Anon.* 1 Atk. 489, 578. *Ex parte Whitfield*, 2 Atk. 315.

(h) ——— *v. Gutteridge*, MS.

(i) See Dict. in *Dalmer v. Dashwood*, 2 Cox, 382. *contra Price v. Williams*, Coop. 31.

(k) *Price v. Williams*, Coop. 31.

(l) *Bryan v. Cormick*, 1 Cox, 422.

(m) *Curling v. Lord Leycester*, 1816. MS. before Vice Chancellor, and confirmed by the Lord Chancellor.

(n) *Phipps v. Bishop of Bath and Wells*, 2 Dick. 608. *See vid. Dalmer v. Dashwood*, 2 Cox, 378.

swear *what sum is due to him, the Court, at the instance [*235 of a second Mortgagee, will appoint a Receiver (o).

If a Mortgagee, though he cannot state with any great precision what Sum is due to him, can say upon Oath he believes a Sum of Money is due, and his Mortgage is not satisfied, the Court will not take the Possession from him, even for the purpose of placing it in the hands of the Court; but where he cannot say a Shilling is due, the Court will take Possession of the Estate, and if it is a *West India* Estate, will appoint a Consignee (p).

Where a Receiver is appointed at the instance of a Mortgagee, the Master generally appoints such a Person as the Mortgagee proposes, unless there is a personal objection to the Man (q); but if such Receiver embezzle, or otherwise wastes the Rents and Profits, the loss, it seems, will fall upon the Mortgagor (r), for the Receiver is considered as an Officer of the Court (s).

If in the case of an Executor, his *Bankruptcy* (t), or any misconduct, waste, or improper disposition of the Assets is shown, the Court will instantly interfere and appoint a Receiver; but the Court will not appoint one merely because the Executor is in mean circumstances, if known to the Testator (u).

**Receivers, Managers, &c.* in cases of Partnership, or [*236 Foreclosure, are appointed only with a view to the Relief prayed by the Plaintiff, in order to *wind up and dispose of the concern*, and not with a view to *carry on and continue the concern* (x). A Receiver, therefore, of Partnership Stock and Effects will not be ordered, while a Trade is going on, unless upon the very grossest abuse, for it would destroy the Trade (y).

When on a Bill to take a Partnership Account, the Partnership is admitted, or is, on an Issue, established, a Motion may be made by the Plaintiff to restrain each Party from receiving the Partnership Effects, and for the Appointment of a Receiver of the outstanding Estate (z).

Where a Partnership subsisted between two Persons, and they both die, and a Suit is instituted for an Account, a Receiver will be appointed; but where there is a Co-partnership, there is a

(o) *Codrington v. Parker*, 16 Ves. 469.

(p) *Quarrel v. Beckford*, 13 Ves. 377.

(q) *Wilkins v. Williams*, 3 Ves. 538.

(r) *Rigge v. Bowater*, 3 Bro. C. C. 365.

(s) *Hutchinson v. Lord Massarene*, 2 Ball & Beatty, 55.

(t) *Anon.* MS. 21 March 1803. Vol. II.

(u) *Anonymous*, 12 Ves. 4; and see *Hathornwaite v. Russell*, 2 Atk. 162. S. C. Barn. 334. *Howard v. Papera*, 1 Madd. Rep. 142.

(x) *Walters v. Taylor*, 15 Ves. p. 11; and see *ibid.*, 2 Ves. & Bea. 330.

(y) *Oliver v. Hamilton*, 2 Anstr. 453; and see what is said in *Milbank v. Revett*, 2 Meriv. 406.

(z) *Peacock v. Peacock*, 16 Ves. 57.

confidence between the Parties, and if *one* dies, no Receiver will be appointed (a).

Nor is a Receiver appointed merely on the Dissolution of a Partnership (b); but where there is a breach of the duty of a Partner, or of the Contract, as by continuing Trade with joint Effects on the separate Account, a Receiver will be appointed (c).

237*] *When a Person takes a Conveyance of a legal Estate, a Rent-charge, for instance, subject to equitable Interests, he must satisfy those Interests, or submit to the appointment of a Receiver (d).

On a Bill by an Heir at Law to controvert a Will, unless there are other circumstances, the Court will not appoint a Receiver (e).

If the Person in possession of real Estate made Assets, has by his Answer stated the circumstances of the Property to be such, that the Court cannot avoid seeing, that in the Administration both the real Estate and the Rents and Profits must become responsible to the demand, the Court will in the first instance, put a Receiver upon the Estate (f).

A Receiver may be appointed of an Estate in the *East Indies*. The usual way is to appoint some Person in this Country, within the Jurisdiction, to be the Receiver, and he appoints his own Agent in *India*. In such a case, it was also thought proper to have a reference to the Master to inquire what should be the Term beyond which the Receiver should not be permitted to let, as this would prevent the necessity of applying to the Court from time to time for permission to let (g).

One Tenant in Common, after a Bill filed, may move that his Co-Tenant in Common, who is in Possession, may give Security for his Share of the *Rents, or that a Receiver may be appointed (h), but the Affidavits in support of the Motion must make out a case of Exclusion (i).

The Court will not direct a Receiver of an Estate, where the matters in dispute depend on a mere *legal Title*, unless strong ground of Title is shown, and the Rents are in danger (k).

Where an Order is made for a Receiver, it is referred to the Master to approve a proper Person; and if the Master approves of a Person proposed as Receiver, the Master's Judgment, though not absolutely conclusive, will not be disturbed, unless upon spe-

(a) *Philipps v. Atkinson*, 2 Bro. C. C. 272.

(b) *Harding v. Glover*, 18 Ves. 281.

(d) *Pritchard v. Fleetwood*, 1 Meriv. 54.

(e) *Knight v. Duplessis*, 1 Ves. 324.

Jones v. Jones, 3 Meriv. 174.

(f) *Jones v. Pugh*, 8 Ves. 71.

(g) ————— v. *Lindsey*, 15 Ves. 91. S. C. MS.

(h) *Street v. Anderson*, 4 Bro. 414. 2 Dick. 300.

(i) *Milbank v. Revett*, 2 Meriv. 404.

(k) *Mordaunt v. Hooper*, AmbL. 311.

cial grounds and a *strong case* (l); it must be shown he is an improper Person (m). Small discussions as to who should be Receiver and have the allowance, are not proper questions for the Chancellor's consideration. The Master, however, in forming his judgment is much influenced by the approbation of a majority of the Parties more particularly interested in the Appointment (n).

Exceptions to the appointment of a Receiver may be taken by Petition (o).

In general, a *Trustee* will not be appointed a *Receiver*, whether he is sole Trustee, or jointly such *with others (p); [*239 but, it seems, it is no objection to a Receiver that he is a *Trustee to preserve Contingent Remainders*, or, as Trustee, has a power to *sell or exchange*; but where there is a power to the *Trustee to lease*, in such case he will not be appointed Receiver (q); and in those cases where a Trustee is appointed he is not allowed any emolument, unless no one else can be procured, who will act with equal advantage to the Estate (r).

The being in Parliament, and a practising Barrister (s), does not absolutely disqualify such a Person from being a Receiver, but are circumstances to be considerably regarded (t). A *Peer* (u), a *Receiver General of a County* (x), a *Solicitor* in the Cause (y), or the *next Friend* of Infant Plaintiffs (z), cannot be a Receiver.

The course of the Court requires a Security by the Receiver, and two Sureties in a recognizance; and taking an Assignment of a Mortgage belonging to the Receiver, instead of pursuing the usual course, has been deemed improper (a).

There are Cases, however, where a Receiver will be appointed merely on giving his own Recognizance, *as where [*240 such Receiver is named by all Parties interested (b).

Sureties for a Receiver will not be discharged at *their* request (c), unless their Office is at an end, and their Accounts are fi-

(l) Garland v. Garland, 2 Ves. jun. 137. Bowersbank v. Collassan, 3 Ves. 164, the case of a Consignee who stands on the same footing as a Receiver. Wilkins v. Williams, *ibid.* 588. Tharpe v. Tharpe, 12 Ves. 317. (m) Thomas v. Dawkin, 3 Bro. C. C. 508. S. C. more full 1 Ves. jun. 452. Cruise v. Bishop of London, 2 Bro. C. C. 253.

(n) 1 Turn. & Ven. 148. (o) Hughes v. Williams, 6 Ves. 459. (p) — v. Jolland, 8 Ves. 72; and see Anon. 3 Ves. 515.

(q) Sutton v. Jones, 1 Ves. 583. (r) Sykes v. Hastings, 11 Ves. 366. (s) As to a Barrister, see Wilkins v. Williams, 3 Ves. 588. and Garland

v. Garland, 2 Ves. jun. 137.

(t) Wynne v. Lord Newborough, 15 Ves. 283.

(u) Attorney-General v. Gee, 2 Ves. & Bea. 208. Ex parte Pincke, 2 Meriv. 452.

(x) Attorney-General v. Day 2 Madd. Rep. 254.

(y) Garland v. Garland, 2 Ves. jun. 137.

(z) Stone v. Wishart, 2 Madd. Rep. 64.

(a) Mead v. Lord Orrery, 3 Atk. 237.

(b) As in Countess of Carlisle v. Lord Berkeley, Ambl. 699. S. C. 1 Dick. 68.

(c) Griffith v. Griffith, 2 Ves. 400.

nally settled, in which case they may apply, by Petition, to have their Recognizance vacated (*d*).

If a Surety for a Receiver has paid any thing on his Account, he is entitled to be indemnified out of the Balance due to the Receiver (*e*).

The Receiver can only be discharged on Petition ; the Court will not do it on further directions ; and it must be a special application (*f*). It is not right to vacate the Recognizance of a Receiver on behalf of an Infant, on the Infant coming of age, and the Receiver passing his Accounts, for defalcations are sometimes found after a great length of time, and if it is proved twenty years after, that a Receiver has not accounted for what he has received, the Money might be recovered under the Recognizance, it has not been vacated (*g*). *Lord Kenyon* held that a Receiver should never have his Recognizance discharged till one year after the Infant has attained his age of twenty-one, and *Lord Eldon* has approved of that Rule (*h*).

If a Receiver be committed on an Attachment for nonpayment of Money, it is in effect considered as civil, not as criminal, 241*] Process, though criminal in its form, and a Note given by the Receiver, with Sureties for payment of the Money, on discharging him, is a good consideration, and binding on the Sureties (*i*).

A Receiver, being an Officer of the Court, need not be served with a Writ of Execution of a decretal Order, but only with a Copy of the Order, and if he disobeys it, he will be committed (*k*).

It is the duty of a Receiver regularly to pass his Accounts, according to the mode prescribed by the General Order of the Court, 22d April, 1796.

There is also a General Order of the Court (*l*), 23d of April, 1796, as follows : viz.

“That the several Masters of this Court shall hereafter fix the Days on which all Receivers in their respective Offices shall annually procure their Accounts to be delivered unto the Masters, and also the Days upon which such Receivers shall pay the Balances appearing due on the Accounts so delivered in ; or such part thereof as the Master shall certify proper to be paid by them ; and it is further ordered, that with respect to such Receivers as shall neglect to deliver in their Accounts, and pay the Balances thereof, at the times so fixed for that purpose, as aforesaid, the several Masters to whom such Receivers are

(*d*) *Turner & Ven. Pract.* 1 Vol. 152.

(*e*) *Glossup v. Harrison*, 3 Ves. & Bea. 134.

(*f*) *Gilbert v. Whitmarsh*, 24 February 1818, before V. C. Leach. MS.

(*g*) Anon. MS.

(*h*) Anon. 7 Nov. 1810. MS.

(*i*) *Brett v. Tomlinson*, 16 East 293.

(*k*) *Macarty v. Gibson*, Mos. 40.

(*l*) Vide General Order, 15 Vez. 278, and the General Order of this subject, 15th December 1792 ; 4 Bro. C. C. 157.

accountable, shall from time to time, when their subsequent Accounts are produced to be examined and passed, not only disallow the Salaries therein claimed by such Receivers, but also charge *Interest at five per-cent. per annum upon the [*242 Balances so neglected to be paid by them, during the time the same shall appear to have remained in the hands of such Receivers; and it is further ordered, that, every Receiver acting under the authority of this Court, shall each year procure his annual Account of Receipts and Payments respecting the Estate intrusted to his care, to be examined and settled by the Master whose duty it may be to inspect the same, within the space of six Months next ensuing the time appointed by such Master for the delivering of such Account into his Office, as is hereinbefore directed; and in case any Receiver shall at any time hereafter neglect so to do, a Certificate of such Default is hereby required from the Master, in whose Office such Neglect or Default shall happen.”

If a Receiver of the personal Estate of a Testator does not, pursuant to the Order, pass his Accounts, and pay in the Balances, he will lose his Salary, and be charged with Interest, but not upon each Sum from the time it was received, according to the strict rule applicable to a Receiver of Annual Rents and Profits, but as an Executor would be charged in respect of his Receipts (n).

Though all Parties express themselves satisfied with the conduct of a Receiver, yet in a Case where a Party had misbehaved by keeping Money in his hands, *Lord Thurlow* said, “though the Parties are satisfied, I will make them more so, if I find he has kept Money in his hands longer than he ought” (o).

*In one Case, *Lord Eldon* was not merely of opinion [*243 that a Receiver who does not pass his Accounts would be liable to pay Interest, but that it would be a question *how far the Solicitor was liable* (p).

If a Receiver makes Remittances to a Banker, to his own Credit and Use, and not to a *separate Account* for the Trust, he will be charged with a loss by the failure of the Banker (q).

It is not necessary for a Receiver to wait till at the instance of some other Person an Order is made upon him to pay in Money received by him, because he may, upon *his own* application, obtain an Order for that purpose (r).

If it be necessary for a Receiver to *bring*, or to *defend*, an Ejectment, he must by Motion apply for the leave of the Court so to do (s); and if the Parties are Infants, or being Adult, con-

(n) *Potts v. Leighton*, 15 Ves. 273. Plymouth, 3 Atk. 480. S. C. 1 Dick. 120; add mentioned and acted upon
(o) *Fletcher v. Dodd*, 1 Ves. jun. 35. 3 Ves. 566; and see ante p. 142.
(p) — *v. Jolland*, 8 Ves. 72. (r) *Potts v. Leighton*, 15 Ves. 274.
(q) *Wrea v. Kirton*, 11 Ves. 377, (s) *Angel v. Smith*, 9 Ves. 336. S. C. MS.
overruling as it seems, *Knight v. Lord*

sent, a reference will be made to the Master to see if it will be for their benefit (*t*). An Ejectment cannot be brought against a Receiver without the leave of the Court (*u*).

It is the duty of a Receiver to let the Estate of which he is Receiver to the best advantage; but he must apply to the Court (*x*), and he cannot turn out Tenants without an application to the Master (*y*). If the Receiver has contracted for a Lease [244*] without the *consent of the Court, the Court will, on Motion, refer it to the Master, to see if the Contract is for the Benefit of the Infant, or what better Rent can be obtained. If the Contract is approved, the Contract will be perfected (*y*); but without the Consent of the Court, a Lease by a Receiver would be invalid (*z*).

A Receiver, it seems, cannot *distrain* on the Owner in Possession without an Order (*a*); but he may distrain on other Tenants, unless there be a doubt who had a legal Right to the Rent (*b*). Where the Owner of an Estate is in Possession of all or part of the Premises, application should be made to the Court that he should deliver Possession to the Receiver, who cannot distrain on the Owner in Possession, as he is not Tenant to him (*c*).

Receivers are not, in general, permitted to apply the Trust Fund in Repairs to *any considerable extent*, without previous application (*d*). It is different as to Managers in the *West Indies*, who have a discretion in regard to their Expenditures (*e*). Formerly, the court never permitted a Receiver to lay out Money without a previous Order of the Court; but now, where the Receiver has laid out Money without such previous Order, [245*] it is usual to refer it to the *Master, to see if the transaction was beneficial to the Parties, and if found to be so, the Receiver is allowed the money so laid out (*f*).

The Manager of a *West India* Estate, to be entitled to commission must be resident on the Island, and personally acting in the absence of the Owner; but though he is not entitled to be paid his Commission, as Commission, during his absence, he is entitled to what he has really paid to others for the Management of the Estate, provided the Payments be in themselves

(*t*) Anon. 6 Ves. 287.

(*u*) Angell v. Angell, MS.; and what is said by Mr. Lloyd, Anon. 6 Ves. 288.

(*x*) Morris v. Elme, 1 Ves. jun. 139.

(*y*) Wynne v. Lord Newborough, 1 Ves. jun. 165. S. C. 3 Bro. C. C. 88.

(*y*) Anon. MS. In this case it was held, that notice of the Motion was not be necessary to the person contracting to take the Lease.

(*z*) Dunford v. Lane, 24 Jan. 1806. MS.

(*a*) Hughes v. Hughes, 3 Bro. C. C. 87; but see S. C. 1 Ves. jun. 161, and Pitt v. Snowden, 3 Atk. 750.

(*b*) 2 Atk. 750.

(*c*) Griffith v. Griffith, 3 Ves. 401.

(*d*) Attorney-General v. Vigor, 11 Ves. 563. Blunt v. Clithero, 6 Ves. 802; and see Morris v. Elme, 1 Ves. jun. 148, and Hicks v. Hick, 3 Atk. 274.

(*e*) Morris v. Elme, 1 Ves. jun. 139.

(*f*) Tempest v. Ord, 2 Meriv. 56.

reasonable, as to which, if it is disputed, there must be an Inquiry (g).

A Receiver cannot, it seems, be *Obliged* to pay any thing, without an Order of the Court (h).

A Receiver is not entitled to any Compensation for his trouble, unless where what he does is in pursuance of an Order of the Court (i).

A Party claiming an Interest in Estates in the Hands of a Receiver, or a Sequestrator, (for the same course takes place in regard to sequestered Estates), an Order is obtainable, upon Notice of Motion, to come in and be examined, *pro interesse suo* (k), wherein a time is limited for filing Interrogatories. After the Examination, the other side hath liberty to examine witnesses to falsify the Examination, and a Commission of course issues if necessary, wherein the Claimant may join, if he thinks fit; and the Commission, if any, is returned. Publication passes by Order. Then an *Order is made to refer it to the [*246 Master, to look into the Examination and Depositions, and to certify whether the Claimant had made out any and what Interest in the Premises, or in any and what part thereof. The Report of the Master is set down to be heard for directions, and the Court pronounces a final Order (l).

A Person ordered to be examined *pro interesse suo*, has been permitted to prosecute and make out her Right *in forma pauperis* (m).

Printing an Order of Court for the Appointment of a Receiver, and distributing it among the Tenants, is no Contempt, though not to be encouraged (n).

5. Motion to Amend Bill

A BILL may be amended before, or after, the Defendant has appeared (o) or answered; but it puts an end to all Process of Contempt, a Sequestration for instance (p): and this, though the Amendment be only by adding Parties, and not requiring a further Answer from the original sole Defendant (d).

If a Bill be filed, and the common Injunction obtained, a Plaintiff, it has been held, cannot afterwards move to amend the Bill without prejudice to the Injunction, as he may, when the Injunction is obtained upon the merits (r). After an Injunction

(g) *Forest v. Elwes*, 2 Meriv. 63.
(h) *Fletcher v. Dodd*, 1 Ves. jun.

85.
(i) *In re Ormsby*, 1 Ball & Beat.
189.

(k) *Mitchell v. Draper*, MS.

(l) *Hunt v. Priest*, 2 Dick. 540, 1.

(m) *James v. Dore*, 2 Dick. 788.

(n) *Baker v. Hart*, 2 Atk. 488.

(o) 1 Eq. Abr. in marg. p. 29.

(p) *Symonds v. Duchess of Cumberland*, 2 Cox, 411.

(q) *Ibid.*

(r) *Turner v. Bazeley*, 2 Ves. & Bea. 330. *Penfold v. Stoveld*, 3 Madd. Rep. 470. *Sed vid. Sharpe v. Ashton*, 3 Ves. & Bea. 144. *Mair v. Thelluson*, *Ib.* 145, in note, and *Mason v. Murray*, 2 Dick. 536.

247*] *granted against one of two Defendants, who afterwards put in their Answers, leave was given, on an application for that purpose, supported by Affidavit, to amend the Bill without prejudice to the Injunction; the Answer of the Defendant against whom the Injunction was not granted, stating facts, which were a surprise on the Plaintiff, and which made the amendments necessary (s).

A Plaintiff, in the *Exchequer*, has not been permitted, on Motion, to amend his Bill to enjoin further Proceedings at Law after a Verdict, without first paying into Court the Sum recovered at Law, although the original Bill was filed before the Verdict was obtained (t).

6. Motion to take Bill *pro Confesso*.

FORMERLY, on original Bills, or Bills of Revivor, if the Defendant did not appear, but stood out all Process of Contempt, the Bill could not be taken *pro Confesso*, or any Decree had against him; but if he ~~appeared~~, and then stood out for want of an Answer, the Bill might have been taken *pro Confesso* (u). Now, however, by the Statute (5 G. 2. c. 25,) if a defendant, after the usual Process of Contempt does not appear, and is brought into Court by *Habeas Corpus*, and refuses to enter his Appearance, the Court, as before observed, will order it to be entered for him, and commit him, and proceedings may be had as if he had appeared.

248*] *If Persons *abscond* to avoid process, the Statute prescribes certain steps to be taken, and if the defendant does not appear, an Order will be made, that the Plaintiff's Bill be taken *pro Confesso*.

To obtain an Order, where the Defendant absconds, for taking the Bill *pro Confesso* under the Statute, the Affidavit must state that the Defendant has been in *England* within two years before the Subpœna (x), and has absconded to avoid the Process of the Court (y); and it is not sufficient that the Party making the Affidavit swears he was informed, and believes, that the Defendant has withdrawn himself in order to avoid being served with the Process of the Court, but it must likewise be sworn by whom the Party deposing received such information (z).

If a Defendant having Privilege of Parliament stands out Process of Contempt, for want of an Answer, the Bill may, on Motion, according to a recent Act (a), be taken *pro Confesso*.

(s) *Vesey v. Wilks and another*, 3 Ves. 113. *Neale v. Norris*, 5 Madd. Rep. 475.

(t) *Harrison v. Delmont*, 1 Price, 118. (y) *Short v. Downer*, 2 Cox, 84.

(u) *Anon.* 2 Freem. 127. Ch. Rep. 403. (z) *Barton v. Malvon*, Barn. 401.

(a) 45 Geo. 3. c. 124, s. 5.

(x) *Bishop of Winchester v. Bea.*

From the Report of one Case (*b*), it was held, the Act only extends to Cases where the Bill is filed merely for a *Discovery*, and not to Bills for *Relief*; but in a subsequent Case it was held to apply to Bills for *Relief* (*c*); there being no reason why the construction of the Act should confine the Relief given by it to Bills of *Discovery* only.

The Statute, (5 Geo. 2. c. 25,) it has been held, extends to Cases where the Defendant has been served with a Subpœna, but has avoided the subsequent *Process, as well as to [*249 Cases where it has not been possible to serve him with the Subpœna (*d*).

If, where an Order is made to take a Bill *pro Confesso* the Defendant moves to discharge it, on payment of Costs, and offers to put in an Answer, the Court it seems, will see what Answer is proposed to be put in (*e*); but if the delay has been extravagantly long the Court will not interfere (*f*).

There must be a strong ground to let in a Party to Answer, against whom a Decree *pro Confesso* has been obtained, it being different from a Decree *nisi*. A general Affidavit of Derangement by the Party is insufficient (*g*).

Where a Party is in custody for not putting in his Answer, and a Motion is made to take the Bill *pro Confesso*, it is not sufficient to produce a Certificate that the Answer is on the File, unless there has been a payment or tender of Costs; but if the Plaintiff has taken an Office-Copy of the Answer it will not be treated as a nullity (*h*).

If there be no more than one Defendant, and all the Process for Contempt has issued, the Bill may, on Motion, be taken *pro Confesso*: but if there are more Defendants the Cause must be set down (*i*).

After two insufficient Answers to an Information, an Order may be obtained to set down the Cause, *in order that the [*250 Information should be taken *pro Confesso* (*k*).

Where a Defendant, to prevent his being brought up by an *alias pluries Habeas Corpus*, as often as he was turned over to

(*b*) Jones v. Davis, 17 Ves. 368.

(*c*) Logan v. Grant, 1 Madd. Rep. 626.

(*d*) Mawer v. Mawer, 1 Bro. C. C. 388. S. C. 1 Cox, 101. Short v. Downer, 2 Cox, 84.

(*e*) Hearne v. Ogilvie, 11 Ves. 77; and see on this subject Dixon v. Amers, 1 Cox, 412.

(*f*) Williams v. Thompson, 2 Bro. C. C. 279.

(*g*) Knight v. Young, 2 Ves. & Bea. 184.

(*h*) Sidgier v. Tyle 11 Ves. 202.

(*i*) Seagrave v. Edwards, 3 Ves. 372.

(*k*) Attorney-General v. Young, 3 Ves. 209. The case contra of Hawkins v. Crook, 2 P. Wms. 556, was shaken in Davis v. Davis, 2 Atk. 21, but this latter case was compromised. In Hawkins v. Crook, it is observable, [see 1 Cox, 413.] the Plaintiff excepted to the Defendant's Answer, which was considered as a waiver of the Plaintiff's right to have the Bill taken *pro confesso*. See also Helston v. Robinson, 4 Vin. 446. pl. 2; and Abergavenny v. Abergavenny, 2 Eq. Abr. 179. pl. 5.

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the Court will send him back to the King's Bench, it was ordered that he should not be taken pro Confesso until the time an alias plus was issued. If the Court is of the opinion that the Bail should be taken pro Confesso, the Bail should be taken pro Confesso as to the original Bill with the Defendant in Contempt to a Court to attend with the Defendant should have the same taken with the Defendant as to the amendments.

It is already seen (u), that where a Party is apprehensive that Witnesses to important facts may die before any Suit or Action is brought, and before he can have an opportunity of examining such Witnesses* in the ordinary way, a Bill lies to perpetuate such Testimony: and where a Suit is commenced, but before, in the regular course of proceedings the Witnesses can be examined, their Testimony is likely to be lost, the Court, on a Motion, on a Bill filed, supported by Affidavit, will grant a Commission to examine such Witnesses *de bene esse*; and this Practice has long been in use, as appears by a Case in *Carey* (o). Where the application is on the ground of *Age*, the motion requires no Notice (p).

A Witness who is *old* (seventy years,) or *infirm*, and in danger of dying, or who, though not *old*, is the *only Witness on the subject* (q), or about to quit the Kingdom (r), or go to Scotland (s), will, on a Motion for that purpose, supported by Affidavit, be ordered to be examined *de bene esse*. And in one Case, *two Persons*, the only Persons who had knowledge of the material facts, were ordered to be examined *de bene esse*, without any regard to their age (t); and it seems, indeed, that wherever Justice requires such examination on these Applications, and the Court looks with some jealousy upon absolute necessity, and never permits them unless upon absolute necessity, because the Witness stands pledged to reswear what has been sworn (x).

(o) *Pendergrast v. Saubergue*, 2 *kin v. Middleditch*, 2 Bro. C. C. 641.
 (n) *Bacon v. Griffith*, mentioned in *Shirley v. Lord Ferrers*, 3 P. 77.
 (p) *Ante*, 1 Vol. 185, &c.
 (q) *p. 48. S. C. 1 Dick 2.*
 (r) *Bellamy v. Jones*, 8 Ves. 31.
 (s) *Shelly v. —*, 13 Ves. 57.
 (t) *Botts v. Verelst*, 2 Dick. 454.
 (u) *Lord Cholmondeley v. the Earl of Oxford*, 4 Bro. C. C. 157.
 (x) *Shelly v. —*, 13 Ves. 56.
 (y) *Bellamy v. Jones*, 8 Ves. 32.

The *Affidavit* in support of the Motion must show that [*252 the particular Person knows the Fact, and (in general) is the only Person who knows it; and it is not sufficient for the Agent to swear that he is informed by the Witness that he can prove the particular Fact, and the belief of the Agent (not showing the ground of his belief) that no other Person can prove it (y).

Where the Plaintiffs at Law had filed a Bill for the Examination of a Witness *de bene esse*, to which the Defendant did not put in any Answer, and the Plaintiffs afterwards obtained an Order for the Examination of the Witness, and gave Notice to the Defendant, and of the Interrogatories intended to be put, and on the same evening examined the Witnesses, who left London the next Day for a foreign Country, and never returned; and the Plaintiffs afterwards obtained a further Order that the Deposition of the Witness should be published, in order that it might be read in Evidence at the Trial: it was held that the Deposition was admissible Evidence at the Trial; for as the Defendant had Notice at the time of the Examination, he might have cross-examined at that time, or applied for further time for that purpose, and it must be presumed, from his not having done either, that he did not wish to cross-examine the Witness (z).

It is an established Rule, that Depositions *de bene esse* are not to be published, unless where there is a moral impossibility to have an examination in chief (a), *as, where the Witness- [*253 dies before Issue joined, or are beyond Sea (b); and when Depositions are allowed to be published they cannot be read at Law, unless it is proved to the satisfaction of the Court that the Witness could not be examined at the Trial (c). On Motion and Affidavit, the Officer in whose possession the original Depositions are will be ordered to attend the Trial, and if it is proved to the satisfaction of the Court of Law, that the Witness is unable to attend, the original Deposition may be tendered to the Court (d).

Where an *Account* must necessarily be directed at the bearing, a Commission to examine Witnesses beyond Sea, before the bearing, will not be granted, if it would delay the Account; but application must be made for such Commission after the Account is directed (e).

After Answer, a Motion may be made for a Commission to examine Witnesses abroad, even in an *Enemy's Country* (f); and

- (y) *Rowe v. —*, 13 Ves. 261. Palmer, 1 Ves. & Bea. 22.
- (z) 1 Maul. & Selw. 4. (d) *Andrews v. Palmer*, 1 Ves. & Bea. 21; but see *Price v. Bridgman*, 1 Dick. 144, where the order was different.
- (a) *Gason v. Wordsworth*, 2 Ves. 337. (b) See 2 Ves. 497. *Marsden v. Bound*, 1 Vern. 331. (e) *Adams v. Bohun*, Barn. 270, 271.
- (c) *Lutterell against Reyneli, and others*, 1 Mod. 284. *Andrews v. (f) Cahil v. Shepherd*, 12 Ves. 333.

in such Cases the practice seems to be, to direct the Commission to the nearest neutral Port (*g*).

In these Cases it is not necessary to state the points to which the Examination is intended to be applied (*h*), but only the name 254*] of the Witness ; that *his Evidence is material, and that he is abroad (*i*). On a Bill for an Injunction, the Court will not grant a Commission to examine a Witness in India, without a full Affidavit of materiality (*k*).

In one Case, it was held there must be an Affidavit that the matter in question arose abroad, or it must appear so on the Pleadings (*l*). And in another Case, where a Commission was sought to prove that a Legacy given by a Codicil was meant to be accumulative, it was thought necessary that the Plaintiff should swear she believed the Legacy was meant to be so (*m*).

In cases where a Commission is executed abroad, the Person who takes it out, and returns it, must make an affidavit that he received it from the Commissioners (*n*).

Where Witnesses were examined *de bene esse*, in Sweden, and the Council of Sweden refused to let a Commission be executed for examining them in chief, the Depositions *de bene esse* were, on Motion, allowed to be read (*o*).

If a Commission be granted to examine Witnesses abroad, and before Examination the Plaintiff dies, yet, if the Examination is previous to notice of the Plaintiff's death, it will be effectual (*p*).

If a Commission to examine Witnesses be taken out in the 255*] Vacation, and has not a certain return, but *only *sine dilations*, it does not expire the first day of the following Term ; but may be continued in Execution the whole of the next Term, to the last Return, and if necessary, the Defendant may apply to enlarge Publication till the last day of the Term (*q*).

Where Commissioners on the Defendant's side do not, owing to illness, attend, and Depositions are taken *ex parte*, a new Commission will, on Motion, be ordered, if accompanied with an Affidavit that the Defendant or his Agents have not seen, heard, or been informed of the Plaintiff's Depositions, nor willingly, will, &c. &c. till he hath examined, or till Publication ; but the new Commission will be at the Defendant's expense, and with liberty to the Plaintiffs to cross-examine (*r*).

(*g*) — v. Romney, Ambl. 62.
r (*h*) Rougemont v. The Royal Exchange Assurance Company, 7 Ves. 304.

(*i*) Oldham v. Carleton, 4 Bro. C. C. 88. See Jessup v. Duport, Barnard, 292, 3, 4.

(*k*) Moody v. Steele, 2 Anst. 386.

(*l*) Akers. v. Chauncey, 2 Bro. C. C. 273; and see Chitty v. Selwyn, 2 Atk. 359.

(*m*) Coote v. Coote, 1 Bro. C. C. 448.

(*n*) Bourdillon v. Alleyne, 4 Bro. C. C. 101.

(*o*) Gason v. Wordsworth, Ambl. 106. S. C. 2 Ves. 325.

(*p*) Thompson's Case, 3 P. Wms. 196, S. C. MS.

(*q*) Barnsley v. Powell, 3 Atk. 593.

(*r*) Grant v. Barber, 2 Bro. C. C. 2.

After the Trial of an Issue, an Order may be obtained to examine *de bene esse*, a witness above seventy, it being suggested there was an intention to move for a new Trial (s).

8. *Motion for payment of Money into Court.*

In general Cases the Court will not deal effectively between Parties till the Answer comes in ; but a Defendant has been ordered to pay Money into Court before an Answer, in a case of gross fraud appearing on the Affidavit of the Plaintiff, and where the Affidavit in Answer was not satisfactory (t). If an Affidavit had been made in Answer, the Court, it seems, would not have interfered (u).

**Motion for leave to sue in Forma Pauperis.* [*256

BEFORE a Suit is commenced, or in any stage of it, application may be made, either by Motion or Petition, for leave to sue in *forma pauperis* on a proper Affidavit, and a Certificate of Counsel that there is a just Cause of Suit.

An Order for suing in *forma pauperis* must be founded on an Affidavit of the Pauper himself, that he is not worth 5*l.*, his just debts being paid, and his wearing apparel excepted ; the Affidavit of another Person to that effect is not sufficient (x). And this indulgence extends only to Persons suing in their own rights, and not where they sue as Executors or Administrators (y). An Affidavit of a Pauper even though convicted of Perjury, is admissible, to enable him to sue as a Pauper (z).

If a Pauper files an improper Bill he is liable to be committed (a). If the Bill contains *Scandal*, he must pay the Costs of it (b). If the Bill be amended by leaving out some of the Defendants, he must pay their Costs (c). If it be dismissed at the instance of the Pauper he also pays Costs (d) ; nor will he be permitted, it seems, to proceed as a Pauper in another Bill until he has paid such Costs (e).

A Party may be *dispaupered* at any time, if it be shown that he is of ability to prosecute the Suit (f), *or misconduct [*257 himself (g). If he is in possession of the Property in dispute,

(s) Anonymous, 6 Ves. 573.

(t) *Jervis v. White*, 6 Ves. 738.

(u) *Ibid.* 739, and *Vann v. Barnet*, 2 Bro. C. C. 158.

(x) *Wilkinson v. Belsher*, 2 Bro. C. C. 272 ; and see 2 Bro. C. C. 22.

(y) *Paradise v. Sheppard*, 1 Dick. 138.

(z) *Bowyer v. M'Evoy*, 1 Ball and Beatty, 562.

(a) *Pearson v. Belchier*, 4 Ves. 630.

(b) Tot. 391.

(c) *New. Harr.* 391.

(d) 3 Bro. C. C. 391. *Newl. Harr.* 391.

(e) *Corbett v. Corbett*, 16 Ves. 410.

(f) *Newl. Harr.* 390. *Pract. Reg.* 320, 321. Edition by Wyatt.

(g) *Corbett v. Corbett*, 16 Ves. 407.

he will not be considered as a Pauper (*h*). Litigious conduct in a former Suit is not a sufficient ground to dispauper a Person (*i*); nor is improper and vexatious conduct in a former Suit, and a Subscription for the Pauper though liable to be impeached as Maintenance, a ground for dispaupering (*k*).

10. *Motion for a Reference of Title (l).*

On a Bill for the specific performance of an Agreement, containing merely an Averment of the Contract, and no special fact put in Issue, a Motion may be made by the Plaintiff *before* Answer, for a reference of the Title, upon his undertaking to do all such acts for the purpose of executing what the Court thinks right, as if the answer was put in, and the cause brought to an Hearing (*m*), the Defendant admitting, that he has no objection to the specific performance upon his being indemnified as to the Title (*n*). Where more than the Title is in dispute and a Statement to that effect is made by the Defendant's Counsel, the Motion will not be granted (*o*).

When an Order is made in these cases it has all the effect of 258*] a *decretal Order*, and the Plaintiff cannot *dismiss his Bill as a matter of course; but it is in the same situation as if no such Order had been made (*p*).

If on such references, the Master reports against the Title, a Motion may be made to dismiss the Bill with Costs, and Costs will be given, if the Court thinks them proper (*q*).

If on a reference of Title to the Master the Vendor establishes his Title before the Master, after contest, upon a different ground from that in the Abstract delivered, the Purchaser is entitled to his Costs of the Reference (*r*).

11. *Motions in respect of Contempt, by not putting in an Answer.*

If a Party neglects to answer in a proper time, the same Processes of Contempt are employed as have before been described in regard to enforcing an *Appearance*. If on an Attachment for want of an *Answer* the Party is taken, the Sheriff may, but is not compellable to, take Bail (*s*), and in that case a Messenger must next be moved for to bring up the Defendant, however dis-

(*h*) *Spencer v. Bryant*, 11 Ves. 49.

(*i*) *Bowyer v. M'Evoy*, 1 Ball & Beatty, 564. 16 Ves. 407.

(*k*) *Corbett v. Corbett*, 16 Ves. 407.

(*l*) See post, p. 360, as to Motions of this description, after Answer.

(*m*) *Balmanno v. Lumley*, 1 Ves. & Bea. p. 224. See also *Low v. Man- ners*, 1 Meriv. p. 19.

(*n*) See *Balmanno v. Lumley*, 1

Ves. & Bea. 224, explained in *Bonner v. Johnston*, 1 Meriv. 372.

(*o*) *Matthews v. Dana*, 3 Madd. Rep. 470.

(*p*) *Briscoe v. Brett*, 2 Ves. & Bea. 378.

(*q*) *Walters v. Pyman*, before V. C. Plumer, 25 April 1815. MS.

(*r*) *Fielder v. Higginson*, 3 Ves. & Bea. 142.

(*s*) 1 H. Blacks. 468.

tant he may live ; and if the Party be not taken by the Messenger, a Motion may be made for a *Sequestration* (t). But if the Sheriff has the Defendant in Custody upon the Attachment, or he was in Custody before (unless confined under a *criminal sentence*) (u), the next Process is to bring him up by Writ of *Habeas Corpus* to be *admonished* *for not putting in his Answer ; [*259 and if he persists in his contumacy, he may by an *alias Habeas Corpus*, and afterwards by an *alias pluries* (x), be brought up and admonished ; but it seems in these cases the Prisoner must be really, or nominally, in the Custody of the Warden of the *Fleet Prison* (y).

If a Defendant be committed for not putting in a sufficient Answer, he is, until a *fourth* insufficient Answer, entitled to be discharged immediately on putting in a further Answer and paying the Costs, or tender and refusal, without waiting the Report upon the reference of exceptions to such Answer (z). Nothing but an Answer will satisfy the Court where a Party is taken on Process of Contempt, though he had not previously obtained all the time for answering allowed by the Court ; and in these cases, if exceptions be taken to the Answer, and are allowed, and the Plaintiff has refused (as he prudently may) the Costs of the Contempt, he may proceed upon the old Process ; but if the Costs have been accepted, the Plaintiff, it seems, must begin his Process of Contempt *de novo* (a), though in one Case the receipt of Costs seems to have been considered as making no difference (b).

*After an Attachment against an Infant for want of an [*260 Answer, the proper course is a Messenger to bring the Infant into Court to have a Guardian assigned (c), but if the Infant lives in *Scotland*, and the Bill respects Lands in *England*, the Court will make an Order to show cause why Process should not issue against him as if he was of full age, or why a Receiver should not be appointed, and if he refuses to answer, the Court will stop the Rents in the Tenants hands (d).

If the Defendant is taken by the Messenger he will be committed to the *Fleet Prison* until he puts in an Answer, and pays,

(t) *Holme v. Cardwell*, 3 Madd. Rep. 114.

(u) *Rogers v. Kirkpatrick*, 3 Ves. 471, 573 ; and see *Moss v. Brown*, 1 Ves. & Bea 78, 306.

(x) *Broughton v. Martyn*, 4 Bro. C. C. 296. *Bailey v. Bailey*, 11 Ves. 151.

(y) *Llodd v. Passingham*, 15 Ves. 179 ; and see *Moss v. Browne*, 1 Ves. and Bea. 78, 306.

(z) *Boehm v. De Tastet*, 1 Ves. & Bea. p. 324. *Bailey v. Bailey*, 11 Ves. 151. *Wallop v. Browne*, 4 Bro. C. C. 212, 223. 1 Dick. 133, 379.

In *Broughton v. Martyn*, 4 Bro. C. C. 296, a Defendant in contempt was discharged on putting in an Answer, and depositing the utmost Sum to which Costs would amount, subject to taxation.

(a) *Boehm v. De Tastet*, 1 Ves. & Bea. p. 327. *Anon.* 2 P. Wms. 481. *Coulon v. Graham*, 1 Ves. & Bea. 331.

(b) *Child v. Brabson*, 2 Ves. 110.

(c) *Eyles v. Le Gros*, 9 Ves. 12.

(d) *Leg v. Turnbull*, 2 P. Wms. 409, 10.

or tenders (e) the Costs of the Process of Contempt; but if the Plaintiff accepts the Answer he waves his right to such Costs (f).

If a *Feme Covert* be in Contempt for want of an Answer, the Husband is liable to an Attachment (g), but the Court has stayed Process of Contempt against him, on an Affidavit that she has left him, and he has no power over her (h); and it seems, that before Process of Contempt issued, the Husband might have moved to be at liberty to put in a separate Answer, and that he might not be liable to Process on account of his Wife's neglect in not answering the Bill, supporting the Application by an Affidavit of the facts by himself, for the Affidavit of his Solicitor would not be sufficient (i). The wife may be attached where 261*] her Husband is out of the *Realm, and she is sued in respect of her separate Estate (k).

Motions before Answer on the part of the Defendant, may be,

1. *Motion for Time to Answer; or for a Commission to take the Answer.*

In a *Town Cause* the Defendant has eight days after his Appearance to put in his Answer; and in a *Country Cause* he has until the first day of the next Term after his Appearance to move for a Commission to take his Answer. It is a Motion of course. If the Defendant is not prepared to put in his Answer in time, he may apply by Motion or Petition for further time, and is entitled to *three Orders* for time. In a *Town Cause* the first Order is for a month's further time; the second, for three weeks; and the third, for a fortnight. In a *County Cause*, the first Order is for six weeks; the second, for a month; and the third, a fortnight.

In a Case, however, where a Suit had been instituted against a Solicitor, an Executor, at his instance, and the Solicitor had not after several years put in an Answer, he was on Motion ordered to answer within a week, and was not considered as entitled to the usual orders for time (l).

Where a Defendant is ill, and unable to travel, he may obtain a *Dedimus* to take his Answer, though he lives within twenty miles of London (m).

262*] *By an Order of the Court (n) if a *third Application* be made for time to answer, the Defendant must consent to en-

(e) See Anon. 1 Madd. Rep. 109.

(f) Smith v. Blofield, 2 Ves. & Bea. 100.

(g) Wyatt's Pract. Reg. 53.

(h) 1 Dick. 143, cited Newl. Pract. 2d Edition.

(i) Barry v. Cane, 3 Madd. Rep. 472.

(k) Prec. Chan. 329. cited Newland's Practice, p. 74. 2d Edit.

(l) Mootham v. Hale, 3 Ves. & Bea. 92; and see Pavit v. Lonsdale, 2 Turn. Ch. Prac. 743, in note.

(m) Newl. Harr. 164, and the MS. cases there cited.

(n) 23d January 1794. 4 Bro. Ch.

ter his Appearance with the Register, by his Clerk in Court, in four days, and that the Serjeant at Arms shall go against him as on a Commission of Rebellion, in case he doth not put in his Answer by the time granted.

By the same Order, on a *second* Application for time to answer an *amended* Bill, or after *exceptions* allowed, the Defendant must consent to the same terms; but it is provided by the Order, that this is not to preclude an Application to the Court under special circumstances (o).

The Order does not mention Peers; but it has been decided, that if a Peer, a Defendant, has obtained a third Order for time, and has undertaken that if the Answer is not put in a Sequestration shall go, and he afterwards puts in an insufficient Answer, a Motion may be made for a *Sequestration absolute* (q).

A Defendant having a third Order for time, upon the terms of the Order (q), and afterwards putting in an Answer which is excepted to, and submitting to exceptions, is not entitled to further time to answer *the exceptions (r); but if a Defendant has only heard one Order for time, and exceptions are allowed to his Answer, he not having previously been put under terms, is entitled of course to one Order for time, and will not be put under terms before the second Order.

And where the Defendant put in a Plea, upon which the Plaintiff amended the Bill, and paid Costs, it was held that this Case did not come within the general Order, but that the Defendant was entitled to the same time to answer as upon an original Bill, because the amended Bill in such case stands in the place of a new Bill, the Amendment being permitted to save expense (s).

If a Defendant demurs without having obtained any of the usual Orders for time to answer, &c. and the Demurrer is overruled, the Defendant is entitled from the day the Demurrer is overruled to the usual Orders for time, unless it appears the Demurrer was used for delay, and then the Court would not give so long a time (t).

And, it seems, that after a Demurrer overruled it is a Motion of course for time to answer (u).

C. 544. Beames's Orders, p. 455. See as to the inconveniences that led to this order, the Anonymous Case in 2 Ves. jun. 270.

(o) See Farnsworth v. Yeomans, 2 Meriv. 142, where further time under the circumstances was given after a second Application for time.

(p) Vid. Gregor v. Lord Arundel, 8 Ves. 87; and see Portier v. De la Cour, *ibid.* 603.

(q) See Order, 4 Bro. C. C. 544. Vol. II.

It was formerly the practice to obtain as much time for putting in a further Answer as for the original Answer. See Gordon v. Pitt, 4 Bro. 462.

(r) Portier v. De la Cour, 8 Ves. 601. Gregor v. Lord Arundel, 6 Ves. 144. See *vid.* Hinckley v. Tomkinson, 1 Cox, 177.

(s) Spencer v. Bryan, 9 Ves. 231.

(t) Anon. 30 June 1807. MS.

(u) Griffith v. Wood, 1 Ves. & Bea. 541; but see Jones v. Saxby,

Before the regular Orders for time to answer have been obtained, a special Application may, if necessary, be made for 264*] time to answer either an original (x), *or an amended Bill (y); and even after an Order for time has been obtained and if the Defendant falls ill, such bodily infirmity operates as an exception to the Rule, that a special Application for time to answer must be made before the ordinary Application for time (z).

If a Bill be filed against a Person who has been sent as Ambassador to a foreign Court, the Defendant may move that Proceedings should be stayed for a year and a day, unless the Defendant should sooner return unto England (a).

Under an Order merely for time to Answer, a Plea may be filed (b), though it be in the nature of a Plea in Abatement (c); but not, it seems, a Plea of Outlawry (d); but under such an Order, and even before it is drawn up (e), a Demurrer cannot be filed (f); nor a Demurrer to part of the Bill, and an Answer to the rest (g). But if there be special circumstances, surprise, for instance, the Defendant will on Motion have leave to demur; but merely showing merits is not sufficient (h). Where the Defendant means to demur only, he must do that without asking time, unless where a special ground is laid. 265*] *He may ask time to answer only; or for time to plead, answer or demur; but if he obtains the latter Order, he cannot demur alone (i); though that may operate very inconveniently (k). Nor is he allowed to demur, and answer only by denying combination, or some such trifling matter (l); he must deny some material fact (m). An Answer to any part of the Bill will overrule a Demurrer to the whole Bill; for answering to any part is inconsistent (n). In such case, the Court, perhaps, on a special Application would relax the Rule (o).

mentioned in the note to 1 Swanst. 194, where it was held that time to answer, in such case, can only be obtained on a special Application.

(x) Anon. MS.

(y) Norris v. Kennedy 12 Ves. 6.

(z) — v. Riddell, 9 Ves. 12.

(a) Pilkington v. Stanhope, 2 Vern. 317.

(b) Anony. 2 P. Wms. 464. 1 Vern. 275. 3 P. Wms. 80. Mos. 207; and see Roberts v. Hartley, 1 Bro. C. C. 56.

(c) De Minckuitz v. Udney, 17 Ves. 355, and Roberts v. Hartley, 1 Bro. C. C. 56.

(d) Phillips v. Gibbons, 18 Ves. 184.

(e) Dyson v. Benson, Coop. 110.

(f) Taylor v. Milner, 10 Ves. 444. 3 P. Wms. 464. Dolder v. Lord

Huntingfield, 11 Ves. 556. Edwards v. Savery, 3 Meriv. 304.

(g) Kenrick v. Clayton, 2 Bro. C. C. 214. Done v. Peacock, 3 Atk. 726; contra, Haster v. Weston, 1 Vern. 463.

(h) Bruce v. Allen, 1 Madd. Rep. 556.

(i) Taylor v. Milner, 10 Ves. 447; and see 2 Bro. 214.

(k) See Redesd. Tr. Pl. 170.

(l) Stephenton v. Gardener, 2 P. Wms. 289. Lee v. Pasco, 1 Bro. C. C. 78. Lansdown v. Elderton, 8 Ves. 526.

(m) Attorney-General v. —, 4 Vin. Abr. 442. Ch. (W. a) C. 2.

(n) See post, tit. Demurrer.

(o) See Redesd. Tr. Pl. 172. 3d Edition.

Though an Order for time to answer only is inconsiderately obtained, the Court will not allow the mistake to be corrected (*p*). A Motion for time to put in an Answer made on the same day an Attachment is sealed for want of Answer is irregular, the Attachment being considered as sealed the first moment of the day on which it issues (*q*). Where a Motion was made for a month's time to answer the original Bill after the Cross-bill by the Defendant was answered and the Cross-bill was answered, and a month expired, a Motion *of course* cannot be made for further time to answer the original Bill (*r*).

2. *Motion by Defendant, to refer a Bill of Foreclosure, or a Bill for a Specific Performance.*

By the *Stat. 7 Geo. 2 c. 20*, it is enacted, that upon a Bill of Foreclosure, the Court, upon application* of the Defendant, having a right to redeem, and upon the admission of the right and title of the Plaintiff, may at any time before the cause shall be brought to a hearing, make such Order or Decree as the Court could have made, if the cause had been regularly brought to hearing; but it is provided, that the Act shall not extend to any case where the Person against whom a Redemption is prayed, shall, by writing, to be delivered before the Money shall be brought into Court, to the Attorney or Solicitor for the other side, insist, either that the Party has no right to redeem, or that the Premises are chargeable with any other Sum than what appears upon the Mortgage, or shall be admitted upon the other side or where the right of Redemption shall be controverted by different Persons; nor shall be any prejudice to subsequent Mortgages or Encumbrancers (*s*).

A Reference to the Master under this Act is considered as proceeding upon an admission that the *Principal and Interest* is due upon the Mortgage; and therefore the Master cannot admit evidence to dispute that (*t*); and where the Bill is not confined merely to Foreclosure, but sets up a distinct demand beyond the Mortgage, no Order or Reference can be made under this Statute (*u*). So if the Mortgagee is by proceedings at Law entitled to *execution*, no relief can be had under the Statute (*x*).

Though the Defendant is entitled by the Statute to come in upon Motion, and have an immediate *Reference, yet if [*267

(*p*) *Philips v. Gibbons*, 1 Ves. & Bea. 186.

(*q*) *Stephens v. Neale*, 1 Madd. Rep. 550.

(*r*) *Noel v. King*, 3 Madd. Rep. 15. 183.

(*s*) See 4 Ves. 105.

(*t*) *Husson v. Hewson*, 4 Ves. 105.

(*u*) *Bastard v. Clarke*, 7 Ves. 489.

(*x*) *Amis v. Lloyd*, 3 Ves. & Bea.

he is in Contempt for want of an Answer he cannot move for a Reference (x).

The Jurisdiction under the Statute gives the effect of a Decree for a Foreclosure by a short Order, and is the same as if the Cause was brought to a hearing. The time for payment, therefore, of the Mortgage-money may be enlarged on the usual terms (y).

UNDER a Bill for the specific performance of an Agreement, where the only question is, whether a good Title can be made, a Reference as to the Title, will, on a Motion by the *Defendant*, be ordered, though no Answer has been put in. Motions of this description on behalf of the Plaintiff have been already observed upon (z).

3. *Motion for a Reference to see if two Suits are for the same Purpose.*

WHERE several Bills are filed by a Rector, praying an account of Tithes, a *special Application* may be made before Answer, for a Reference to the Master, to examine and certify whether the several causes, and some and which of them, may not be consolidated, and in the mean time that all further proceedings may be stayed (a).

It has never been reduced to a general Rule that one Bill should be depending only where there is a number of Creditors concerned (b). A Bill was brought by Creditors in the *Court of Exchequer*, and a Decree was made, and then other Creditors 268*] filed a Bill in *Chancery* for the same purpose, and, the Court decreed the Account, &c. the Decree in the *Exchequer* not being complete (b).

There is a Case in *Moseley* (c), in which it was held, that on the Motion of a Defendant before answer, the Court will refer it to the Master to see if two Suits instituted against the Defendant are for the same matter; and Lord Hardwicke, in another Case, observed, that if two Actions at Law are brought in the same name, and for the same matter, the pendency of one may be pleaded in abatement to the other; but if two such Bills are brought, this Court takes a more particular method; referring it to a Master to inquire whether both are for the same matter, and if so, may stop proceedings in the

(x) *Hewitt v. M'Cartney*, 13 Ves. 560.

(y) *Wakerell v. Delight*, 9 Ves.

36. S. C. Coop. 27.
(z) *Ante*. p. 257.

(a) *Keighly v. Browne*, 16 Ves. 344.

(b) *Anon. Atk.* 603.

(c) *Coysgarne v. Jones*, Ambl. 613. P. 268.

last (d) ; but in a recent Case this Motion has been refused, the regular mode of obtaining the Reference being held to be, by *Plea* (e).

If two Bills are brought on behalf of an *Infant*, by different *Prochein Amies*, the Court refers it to see if they are for the same matter, and which is most for the *Infant's* benefit, and will stop the other (f).

If there be a Mortgage on Real Estate, and a derivative Mortgage or Assignment thereof made by the, Mortgagee, the Assignee or derivative Mortgagee may bring two Bills to have a Redemption or Foreclosure ; nor can the Court stop either of the Suits, though when the Causes come to be heard it would form an ingredient in the consideration of Costs, *which [*269 the Court would order to be paid for the vexation (g).

So a Man may bring two Bills at his own expense, making use of the name of his Assignor in one ; nor can the Court say he shall be stopped in that one (h).

4. Motion that Defendant, a Feme Covert, may answer separately.

A MARRIED Woman, if she cannot conscientiously swear to the Answer proposed to her by her Husband, may apply for an Order for leave to put in a separate Answer (i). If the Husband insists on the Wife putting in the Answer he wishes, it is punishable as a Contempt of Court (k).

If a Husband is Plaintiff in a Suit, and makes his Wife a Defendant, she may answer separately, without an Order of the Court for that purpose (l) ; but if she refuses to answer, an Attachment, it seems, may issue in the first instance ; but the better mode is first to move for an Order that she may put in an Answer (m).

Regularly, the Answer of a *Feme Covert*, if separate, ought to have an Order to warrant it ; but if the *Feme Covert's* separate Answer be put in without an Order, and the same be a fair and honest Answer, and deliberately put in with the consent of the Husband, and the Plaintiff accepts and replies to it, the Court *will not at the instance of the Wife, or of her Executor, [*270 set it aside (n).

(d) Gage v. Lord Stafford, 1 Ves. 545.

(e) Murray v. Shadwell, 17 Ves. 353.

(f) See 1 Ves. 545. Gage v. Buckley, Amb. 163.

(g) See 1 Ves. 545. Gage v. Buckley, Amb. 163.

(h) Ibid. 546.

(i) Anon. 2 Eq. Abr. 66.

(k) Ex parte Halsam, 2 Atk. 50.

(l) Ex parte Strangeways, 3 Atk. 478. Replead. Tr. Pl. 95, 96, 2d edit.

(m) Anshie v. Medicot, 13 Ves. 266.

(n) Duke of Chandos v. Talbot, 2 P. Wms. 370.

5. Motion for leave to defend in *Forma Pauperis*.

A DEFENDANT, swearing he is not worth five pounds, his just Debts being paid, and his wearing apparel excepted, will, on Motion or Petition, be admitted to defend the Suit in *forma Pauperis*; nor is any Certificate of Counsel necessary, as it is on the application of a pauper Plaintiff.

An Affidavit that the Defendant is not worth more than five pounds, except the matters in question, will not entitle him to defend in *forma Pauperis*, where it appears the Defendant is in possession of Land in question (o).

6. Motion for Security for Costs.

If on the face of the Bill the Plaintiff appears to be *beyond Sea* (p), or if at the time of filing the Bill the Defendant knows it, the Defendant may (unless there be Co Plaintiffs resident here (q), or the Plaintiff be a Land or Sea Officer, or Consul) (r), apply for Security for Costs; but the Motion, when the fact is known, should be made before Answer, or time prayed to answer, otherwise it is considered as waved (s); and though exceptions are allowed to the Answer, it is considered an Answer 271*) as to this purpose* (t); and where the Answer was filed by mistake, the Rule was still held to apply (u).

If the Defendant is a stranger to the fact, and it comes only to his knowledge in the course of the Cause, the Motion may be made when the information is acquired (x); though that be after the Answer (y), unless by subsequent proceedings, the Plaintiff's rights are recognized (z).

If the Plaintiff describes himself in his Bill, or a place where he cannot be found, he must give Security (a).

A Plaintiff going abroad (c), or living abroad, is not compellable to give Security for Costs; for that purpose, he must not only be *resident* (d), but *settled* abroad (e); or *going to settle*

- (o) *Spencer v. Bryant*, 11 Ves. 49. contra *Keagwick v. Inglis and Hugh*, in Exchequer, MS.
 (p) *Gibson v. Scudamore*, Mos. 7.
 (q) *Walker v. Easterby*, 6 Ves. 612. 1 Dick. 282.
 (r) *Colebrook v. Jones*, Dick. 154.
 (s) *Anon.* 10 Ves. 287. *Craig v. Bolton*, 2 Bro. C. C. 609. *Stackpole v. O'Callaghan*, 1 Ball & Beatty, 566.
 (t) See the case mentioned 3 Wood, Lect. 387, in note.
 (u) *Dyott v. Dyott*, 1 Madd. Rep. 187.
 (x) *Meliorucchy v. Meliorucchy*, 2 Ves. 24. S. C. 1 Dick. 147; and see *Loneragan v. Rokeby*, 2 Dick. 799,
 (y) *Weeks v. Cole*, 14 Ves. 518.
 (z) *Gordon v. Plunket*, mentioned in note to 1 Ball & Bea. 567.
 (a) 2 Fowl. Exch. Prac. 370; and see what is said in *Anon.* 1 Ves. jun. 409.
 (c) *Hoby v. Hitchcock*, 5 Ves. 700.
 (d) *Green v. Charnock*, 3 Bro. C. C. 371. S. C. 1 Ves. jun. 377, and 2 Cox, 284.
 (e) *Anon.* 2 Dick. 775. *Beckman v. Le Grange*, 2 Anstr. 359. Pract. Reg. 117.

abroad (*f*), and in a Case where the Plaintiff, after the filing of the Bill, and an answer by the Defendant, went to the West Indies for the purpose of arranging his Affairs, and informed his Solicitor (as the Solicitor swore,) that he intended soon to return to this country, where he left his Family, the Chancellor refused to order Security to be given for Costs (*g*). The Plaintiff must show he is not gone abroad to reside (*h*).

*Where the Plaintiff was about to be sent out of the [*272 Kingdom under the Alien Act, Security for Costs was required (*f*), as he could not return (*g*).

A Plaintiff out of the Jurisdiction must give Security for Costs to the extent of forty pounds, nor will the Security be increased on the ground of the Plaintiff being in distressed circumstances (*h*). If, however, the Plaintiff asks a favour of the Court, some terms may be imposed (*i*); but it seems doubtful whether the Court will act without a Reference to the Master (*k*). If there be more than one Defendant, each, if they employ different Clerks in Court, is entitled to a separate Bond for 40*l.*, but only one 40*l.* is payable by the Plaintiff (*l*).

Where a deed appeared to have been obtained by Duress, and a Bill was filed to have it delivered up, the Plaintiffs in a Cross-Bill had liberty to bring an Action; but the Plaintiff was ordered to give Security for the Costs (*l*).

Though a Plaintiff be insolvent, a Defendant, it seems, cannot oblige him to give Security for Costs (*m*), not even if he becomes *Bankrupt* (*n*); but in the case of an Insolvent *Amy*, who files a Bill in an Infant's name, the Defendant, it has been said, may apply to the Court in order to have a solvent *Amy* named (*o*).

*If a Bill be filed and dismissed with Costs, by default, [*273 and a new Bill is filed for the same Purpose, a Motion may be made for a month's time to answer, after payment of the Costs of the previous cause, in like manner as at Law (*p*).

If an administrator against whom a Bill is filed by Creditors for a discovery of Assets, is about to leave the Kingdom to go to a Place (though it be his place of abode) out of the reach of the Process of the Court, the Court will, on Motion, oblige the

(*f*) *Green v. Charnock*, 2 Cox, 284. Pract. Reg. 117.

(*g*) *White v. Greathead*, 15 Ves. 2.

(*h*) *Ibid.* 3.

(*i*) *Seilaz v. Hanson*, 5 Ves. 261.

(*g*) *Hoby v. Hitchcock* 5 Ves 700.

(*h*) *Ogilvie v. Hearne*, 11 Ves. 598.

(*i*) *Gage v. Lady Stafford*, 2 Ves. sen. 557.

(*k*) *Ogilvie v. Hearne*, 11 Ves. 600.

(*l*) *Lowndes v. Roberts*, 17th Jan. 1820. MS. The form of the Bond in that able and useful Work, Ven. &

Turn. Practice, 1 Vol. 332, 4th edit. is not correctly given.

(*l*) *Coleman v. Sarrell*, 1 Bro. C. C. 55.

(*m*) *Squirrel v. Squirrel*, 3 P. Wms. 297 n. 1.

(*n*) *Anon.* 2 Anstr. 407.

(*o*) *Turner v. Turner*, 2 P. Wms. 297. S. C. Sel. Cas. 49. 1 Str. 708; and see *Anon.* 1 Ves. jun. 409. See *vid.* *Squirrel v. Squirrel*, in note 1, to P. Wms.'s Report, S. C. 2 Dick. 764.

(*p*) *Pickett v. Loggan*, 5 Ves. 702.

Defendant, by his clerk in Court, to give a Security, to be approved of by the Master, to abide the Decree that shall be made at the hearing of the cause (g).

7. Motion to Amend Plea.

A DEFENDANT cannot withdraw his Plea and put in another; but the Court will, generally, give him leave to amend it (r); and even after argument, where the Plea is sufficient in *substance*, but defective in *form* (s); but the Party amending, is tied down to a very short time (t). And, it seems, on a Motion to amend, the form of the Plea intended to be put in should be stated, that the Court may be enabled to see whether it is material that the Cause should be delayed for the purpose of admitting the Amendment (u). Where the Plea is double and inconsistent,* and will not admit of Amendment, leave has been given to withdraw it, and plead *de novo* (x).

Sometimes when liberty is given to plead *de novo*, or make a new defence, the Plaintiff is also allowed to amend his Bill (y).

When a Plea has once been amended, leave to amend again was refused, and the Defendants compelled to answer immediately (z).

If a Plea be overruled as informal, the Defendant cannot, without leave of the Court, plead the same matter again more formally (a); nor will the Court give such leave if it be a case where the Defendant is not entitled to favour (b).

8. Motion for Production of Papers, &c. in Bill mentioned, necessary to the Defence.

WHERE a Deed is in the Plaintiff's hands, and is mentioned in his Bill, and is necessary to the Defendant's making his defence and a full Answer, the Court will order that the Plaintiff shall give him a Copy of it (c). Motions of this description have, however, been hitherto infrequent. Where in a Bill against Executors the Plaintiff stated two Instruments executed by the Testator for securing the same Debt, on an Affidavit of

(g) Baker v. Dumaresque, 2 Atk. 66.

(r) Patterson v. Slaughter, Amb. 293.

(s) Merewether v. Mellish, 13 Ves. 439.

(t) Nobkissen v. Hastings, 2 Ves. jun. 87.

(u) Nabob of Arcot v. the East India Company, 3 Bro. C. C. 300, 1; and see Newman v. Wallis, 2 Bro. C. C. 143.

(x) Nobkissen v. Hastings, 2 Ves. jun. 87.

(y) As in Crow v. Tyrell, 2 Madd. Rep. 410.

(z) Nabob of the Carnatic v. East India Company, 1 Ves. jun. 371.

(a) Freeland v. Johnson, 2 Anstr. 407.

(b) Hoare v. Parker, 1 Cox, 229.

(c) Pract. Reg. Wyatt's Edit. p. 161; approved by Lord Eldon in Princeps of Wales v. Earl of Liverpool, 1 Wils. C. C. 125, 6. S. C. 1 Swanst. 114.

one of the Executors that he had seen one of the Instruments, and stating *circumstances appearing on the face of that [*275 Instrument creating doubts respecting its authenticity, and that the second Instrument had been produced for Payment by the Plaintiff in a foreign Country, and also stating the Defendant's belief that if before Answer he should have an inspection of the second Instrument that his answer might meet the Case; it was ordered that the Defendant should not be called on to answer till a fortnight after the second Instrument should be produced (d).

9. *Motion to stay Proceedings in Original Cause till Cross-bill answered.*

Cross-bills will be observed upon hereafter (e), and it is only necessary here to observe, that the Plaintiff has a right to an Answer to his Bill before he can be called upon to answer a Cross-bill; but if before Answer, and after the Cross-bill filed, he amends his original Bill, he loses his Priority, and the Plaintiff in the Cross-cause is entitled to have his Bill answered before he answers the original Bill (f); and it is not necessary that the Amendments be material, to have this effect (g); but in order to stay proceedings in the original Cause, it is necessary to obtain an Order to stay proceedings in that Cause until an Answer put into the Cross-bill (h).

*10. *Motion to refer Bill for Scandal, or Impertinence.* [*276

An *Original* or *Amended* Bill may on Motion be referred for *Scandal* or *Impertinence*; but after an Answer (i), or even after an Order for time to answer, the Defendant cannot move to refer the Bill for *Impertinence*, though he may obtain a reference for *Scandal* (k); for *Scandal* may be taken advantage of at any time (l).

If a Bill is scandalous, it is impertinent of course; but it may be impertinent without being scandalous. Nothing relevant is scandalous; and the *major* or *minus* of the relevancy is not material (m).

(d) *The Princess of Wales v. The Earl of Liverpool*, 1 Wils. 113. S. C. 1 Swanst. 114.

(e) See tit. Cross-bill.

(f) *Stewart v. Roe*, 2 P. Wms. 435. *Long v. Birton*, 2 Atk. 219. *Johnson v. Freer*, 2 Cox, 471. *Noel v. King*, 2 Madd. Rep. 392.

(g) *Johnson v. Freer*, 2 Cox, 371. *Noel v. King*, 2 Madd. Rep. 392.

(h) *Noel v. King*, 2 Madd. Rep. 392.

(i) See Mr. Cox's note to *Abergavenny v. Abergavenny*, 2 P. Wms. 313.

(k) *Anonymus*, 5 Ves. 666.

Anon. 2 Ves. 631, *Ferrar v. Ferrar*, 1 Dick. 173.

(l) *Feaboulet v. Passavant*, 1 Ves. 24.

(m) *Ibid.* and see *Lord St. John v. Lady St. John*, 11 Ves. 526.

If matter in an Answer relates to the subject, the Court will not look critically into its materiality, for though not material, as it appears from the statements in the Bill, it may become so by Evidence. The party must show it never can have any relation to the subject of the Suit, to make it impertinent (n).

When a Man's conduct is complained of in a Bill, it is not impertinence to state in his Answer the reasons of his conduct. Nothing is impertinent, unless it cannot be material.

When a short description of Letters is asked, it is impertinent to state the short contents of the Letter (o).

277*] *Upon a Bill being referred before the time for answering is out, the Plaintiff cannot at the expiration of the time move for an Injunction, as of course, for want of an Answer; but is in the same situation as if the time for answering was not out, in which case it must be moved upon Notice, and an Affidavit of the circumstances (p).

If a Bill be referred for impertinence, and the Master reports it pertinent, the Defendant may except generally, without specifying the parts of the Bill which are impertinent (q).

An amended Bill, repeating all the charges and allegations in the original Bill, is impertinent so far as regards such repetition (r); but it is not impertinence to state in an amended Bill part of the Answer by way of pretence, and interrogate as to it (s).

If the Master reports that the Bill is *impertinent* in the several parts of the same, specified in the Report, the Defendant is entitled immediately after the Report made, as a matter of course, to move that the Six Clerk with whom the Bill is filed may attend the Master therewith, in order that he may expunge such part thereof as he has reported to be impertinent: and that it may be referred back to the Master to tax the Costs of the Reference, and that the Costs when taxed, may be paid by the Plaintiff (t).

278*] If a Bill contains *Scandal* on a *third Person*, not a *Party to the Suit, it seems an Action will lie (u), and it will lie by a Defendant to a Suit where the Court has no Jurisdiction over the subject matter of the Suit (x); but for any matter contained in a Bill as to which the Court has Jurisdiction, no Action lies, although it be false (y), because it was in a course of justice.

(n) Ramsden v. Cass, before Vice Chan. Leach, 4 March 1818. MS.

(o) — v. De Tastet, before V. C. Leach, 6 March 1818.

(p) Neale v. Wadson, 1 Bro. C. C. 574.

(q) Mackworth v. Briggs, 2 Atk. 181.

(r) Willis v. Evans, 2 Ball & Bea. 225.

(s) Seeley v. Boehm, 2 Madd. Rep. 176.

(t) Muscott v. Halhead, 4 Bro. C. C. 222.

(u) Buckley v. Wood, Cro. Eliz. 230.

(x) Ibid. and see S. C. 4 Co. 14b.

(y) 4 Co. 14b.

11. *Motion for Leave to withdraw a Demurrer.*

A Defendant will, on Motion, and payment of Costs, to be taxed, be allowed to withdraw a Demurrer, though set down to be argued (z).

12. *Motion for a Guardian to put in an Answer.*

WHERE a Defendant was deaf, and incapable of giving Instructions for his Answer, the Court, on Motion, ordered a Commission should issue for taking the Answer in the old way, with the Bill annexed, for the Commissioners themselves to endeavour to take the Answer (a).

If a Defendant be infirm in body and mind, and incapable of putting in an Answer, it is usual to have a Guardian appointed to put in the Answer; an Order on Motion, that the Defendant may put in his Answer without Oath or Signature, not being a proper mode of proceeding (b). This Answer may be read against *him, unlike the Case of an Infant's Answer put [*279 in by Guardian (c).

If an Infant Defendant be abroad, he cannot have a Guardian assigned to put in his Answer, (as the Infant's appearance in Court is necessary for that purpose, however distant he may live); but a Commission must go (d). So if the Infant be too ill to appear in Court, a Commission will be ordered (e). In a recent case, however, a Guardian was appointed of an Infant to put in an Answer, and his presence in Court dispensed with, on an Affidavit of his inability to attend from illness (f).

A Motion for leave to answer by Guardian must name the Guardian (g).

Idiots and Lunatics defend by their Committees, who will, on application to the Court be appointed Guardians for that purpose; and if the Idiot or Lunatic has no Committee, or the Committee has an Interest opposite to that of the Person whose Property is intrusted to his care, an order may be obtained for appointing another Person as Guardian (for the purpose of defending the Suit) (h).

(z) Downes, v. East India Company, 6 Ves. 586.

(a) Gregory v. Weaver, 18 Geo. 2. 1746. MS.

(b) Wilson v. Grace, 14 Ves. 172; and see Cooper, 33, 109. Redesd. Tr. Pl. 82. 3d edit. Attorney-General v. Waddington, 1 Madd. Rep. 321.

(c) Proc. Chan. 229. Gilb. Rep. 4.

(d) Tappen v. Norman, 11 Ves.

563. *Sed vid.* Jongsma v. Pfiel, 9 Ves. 357.

(e) Duke of Marlborough v. Duchess of Marlborough, 1 Dick. 71.

(f) Hill v. Smith, 1 Madd. Rep. 290.

(g) Brassington v. Brassington, 2 Anstr. 369.

(h) Redesd. Tr. Pl. 82. 3d edit.

13. *Motion for a Reference to ascertain whether a Suit is for the Benefit of an Infant.*

IF a Bill be filed by a *prochein Amy* on behalf of an Infant, a 280*] Motion may be made, (but not by *the *prochein Amy*) (i), for a reference to a Master to certify, whether the Suit is for the benefit of the Infant (k). And if two Suits, for the same purpose, are instituted in the name of an Infant, by different Persons acting as his next Friend, the Court will, at the risk of the Party making the Application (l), direct an Inquiry which Suit is most for his benefit; and where that fact is ascertained, will stay proceedings in one of the Suits (m). The *Master's Report* in such case cannot be excepted to, but any objection to it must be made when it is moved to confirm the Report (n).

If it appears that the two Suits are not for the same purpose, a Motion may be made to discharge the Order with Costs (o).

14. *Motion that Answer may be taken without Oath or Signature; or, that a Third Person may put in the Answer.*

IN a Case where the Defendant went abroad in a hurry without signing his Answer, the Chancellor, on a Motion for that purpose, which was consented to, ordered the Answer to be taken without Oath, and the *Six Clerk* to receive the Answer without Signature (p). And in other Cases, on a special Application, the Answer has on Motion been ordered to be taken without Oath or Signature (q).

281*] *15. *Motion for a Reference to ascertain what is due in respect of the claims made by the Plaintiff's Bill.*

THE Defendant may before Answer move for a Reference to the *Master*, to ascertain what is due to the Plaintiff in respect of the claims made by his Bill; undertaking to pay what is found due, and all Costs (r).

Defence to Bills.

PERSONS against whom a Bill is filed may defend themselves in various ways, as the exigency of the Case requires. As, 1,

(i) Jones v. Powell, 2 Meriv. 141.

(k) Da Costa v. Da Costa, 3 P.

Wms. 140.

(l) Sullivan v. Sullivan, 2 Meriv.

43.

(m) See Redesd. Tr. Pl. 27.

(n) Whitaker v. Master, 1 Cox, 285.

(o) Sullivan v. Sullivan, 2 Meriv.

43.

(p) — v. Gwillim, 6 Ves. 285.

(q) Bayley v. De Walkiers, 10 Ves.

441. Harding v. Harding, 12 Ves.

159; and see — v. Lake, 6 Ves.

171.

(r) Boys v. Ford, 4 Madd. Rep. 42, and the Cases there mentioned.

by a *Demurrer* ; 2, by a *Plea* ; 3, by an *Answer* ; or 4, by *Disclaimer*. These several modes of defence will be separately considered.

1. *Demurrer*.

We have already had frequent occasion to notice *Demurrers*, but the subject requires a separate consideration.

A *Demurrer* must be signed by Counsel, but is without Oath, and may be put in after the time for answering is out, and at any period before the Defendant is affected by Process of Contempt, (s), except, perhaps, after an Injunction issued upon a *Dedimus Protestatem* to take the Defendant's Answer (t). If after orders for time to plead, answer, or demur, not demurring alone, the Defendant is attached for want of an Answer, and then puts in a *Demurrer* and an *Answer, it will be ordered to be [*282 taken off the file ; for after an Attachment for want of an Answer he can only Answer (t).

Whenever any ground of Defence is apparent on the Bill itself, either from matter contained in it, or from a defect in its frame, or in the case made by it, the proper mode of defence is by *Demurrer* (u).

A *Demurrer* is always in bar, and goes to the merits of the case (x). It must be founded upon this ; that taking the charges of the Bill to be true (y), it is clear that the Bill would be dismissed, with Costs, at the hearing (z) ; and though the Court has an idea, that if the Cause goes on, there may be some ground for a decree, yet, it seems, it is bound to say, whether upon the facts, as stated in the Bill, if proved or confessed, a Decree would be made at the hearing (a).

If a *Demurrer* is put in, and overruled, it is never allowed, as a *Plea* frequently is, to stand for an Answer (b).

A Defendant cannot demur and plead (c), or demur and answer (d), to the same matter, for the Answer will overrule the *Demurrer* (e) ; and a *Demurrer* to relief, is overruled by an Answer to the *facts (f), or parts of the Bill (g), in respect [*283 of which relief is prayed.

(s) *East India Company v. Henchman*, 3 Bro. C. C. 372. *Sowerby v. Warder*, 2 Cox, 268.

(t) See *Edmonds v. Savary*, 3 Meriv. 309.

(u) *Curzon v. De la Zouch*, 1 Swans. 185 ; and see *Broughton v. Jones*, 3 Madd. Rep. 190.

(v) *Redeod. Tr. Pl. 86*.

(x) *Roberdeau v. Rous*, 1 Atk. 543.

(y) See *Utterton v. Mair*, 2 Ves. jun. 95.

(z) *Brooke v. Hewitt*, 3 Ves. 255.

(a) *Kemp v. Prior*, 7 Ves. 245. The contrary doctrine in 2 Ves. 247,

and in *Prec. Ch. 589*, is thought to have fallen incautiously from the Court. See *Redeod. Tr. Pl. 137. n.*

(b) *Anon.* 3 Atk. 530.

(c) *Dormer v. Fortescue*, 2 Atk. 283. *Jones v. Earl of Strafford*, 3 P. Wms. 80.

(d) 3 P. Wms. 80.

(e) *Redeod. Tr. Pl. 171*.

(f) *Roberts v. Clayton*, 3 Anstr. 715.

(g) *Savage v. Smallbroke*, 1 Vern. 90.

If a Defendant has answered the original Bill, and the Plaintiff amends it, unless he makes a perfectly new Case, the Defendant cannot demur (*k*); but whether it is a ground for taking the Demurrer off the file, or only for overruling it on argument, has been doubted (*i*).

A Demurrer must express the several causes of Demurrer; and in case the Demurrer does not go to the whole Bill, it must clearly express the particular parts of the Bill demurred to, for the Court is not to be at the trouble of looking into the Bill and Answer to see what is covered by the Demurrer; it ought therefore to be expressed in clear and precise terms what it is that the Party refuses to answer, so that the Master, upon a reference of the Answer to him upon exceptions, should be able to ascertain precisely how far the Demurrer goes, and what is to be answered. It is not a proper way of demurring to say that the Defendant answers to such and such facts, and demurs to all the rest of the Bill; for this would put the Master to great difficulty in saying what was demurred to, and whether the Answer was sufficient, or otherwise; the Defendant ought to demur to a particular part of the Bill, specifying it precisely, and answer to all the rest (*k*). If a Demurrer is general to the 284*] whole Bill, and there is any part, *either as to the relief, or the discovery, to which the Defendant ought to put in an Answer, it is generally considered that the Demurrer, being entire, must be overruled (*l*); but that does not deprive the Party of his Equity; for the same thing may be insisted on in his Answer (*m*). There are instances of allowing a Demurrer in *part* (*n*), and a Defendant may put in a separate Demurrer to separate and distinct parts of a Bill, for separate and distinct causes; for the same ground of Demurrer frequently will not apply to different parts of a Bill, though the whole is liable to a Demurrer; and in such case, one Demurrer may be overruled upon argument, and another allowed (*o*).

If a Defendant has demurred to *part only* of a Bill, and then answered other parts, it is no objection to the allowance of the Demurrer that it is equally applicable to the whole of the Bill (*p*).

A Demurrer admits all those facts that are well pleaded (*q*),

(*k*) Atkinson v. Hanway, 1 Cox, 360.

(*i*) Atkinson v. Hanway, 1 Cox, 360.

(*k*) Devonshire v. Newenham, 2 Sch. & Lefr. 207; and see Chetwynd v. Lyndon, 2 Vez. 450.

(*l*) Attorney-General v. Browne, 1 Swanst. 304.

(*m*) Bishop of Soder and Man v. Earl of Derby, 2 Ves. 357. Earl of Suffolk v. Green, 1 Atk. 451, and

the Cases cited there in note 1. Baker v. Mellish, 11 Ves. 70.

(*n*) Rolt v. Lord Somerville, 2 Eq. Cas. Abr. 759. Radcliffe v. Fursman, 3 Bro. P. C. 538.

(*o*) Redesd. Tr. Pl. 174. 3d Edition.

(*p*) Mayor of Dartmouth v. Seale, 1 Cox, 416.

(*q*) East India Company v. Henschman, 1 Ves. jun. 289. 1 Vez. 426.

and the facts alone, without the conclusion of Law (r). Where therefore it is inexpedient to admit the Facts stated in the Bill, the Party, it has been held, should insist by his Answer that he is not bound to answer (s); but as it is now held *that if a [*285 Party answers at all, he must answer fully (t), that mode of defence does not seem feasible.

After a *Demurrer to the whole* Bill is allowed, the Bill, strictly speaking, is out of Court, as was insisted, though unsuccessfully, in a Suit in which *Sir Joseph Jekyll* was Defendant (u); but the Defendant may, afterwards, by leave of the Court, put in a *Demurrer to part* of the Bill (x); or, it has been held, he may by *Answer* insist that he is not obliged to answer (y); but here again the before-mentioned objection, founded on *Mazarredo v. Maitland*, applies. At Law, where there is a *Demurrer*, if Judgment be against the Defendant, it is a perpetual bar (z).

A *Demurrer* allowed being frequently on a matter of form is not in general a bar to a new Bill; but if the Court upon a *Demurrer* has clearly decided upon the merits of the question between the Parties, the decision may be pleaded in bar of another Suit (a).

It was, after great consideration, laid down as a Rule by *Lord Thurlow* (b), that a *Demurrer*, if good *to the *Relief* pray- [*286 ed by a Bill, is, as before observed (c), good also to the *Discovery* sought for the purpose of the Relief; and this *Lord Alvanley* termed, "one of the wisest rules ever established (d)." The Defendant, however, may waive the benefit of the Rule as against himself, and may demur to the relief, and yet answer as to the discovery (e); but he cannot answer the Discovery in part, and demur to part (f); nor can he demur to a Discovery only, and not to the *relief* prayed (g), because he may be en-

(r) *Ford v. Peering*, 1 Ves. jun. 78. *Lord Raym.* 18. *Williams v. Steward*, 3 Meriv. 503.

(s) See *Honeywood v. Selwyn*, 3 Atk. 276.

(t) *Mazarredo v. Maitland*, 3 Madd. Rep. 66. See post. tit. Answer.

(u) *Lord Coningsby v. Sir Joseph Jekyll*, 2 P. Wms. 300; and see *Bancroft v. Warden*, 2 Dick. 673. In these cases it seems most proper for the Court, if the ground of *Demurrer* may be removed by Amendment, to make a special Order adapted to the circumstances of the Case. *Redesd. Tr. Pl.* p. 13, in note.

(x) *Baker v. Mellish*, 11 Ves. 68. S. C. MS. *Redesd. Tr. Pl.* p. 17.

(y) *Dormer v. Fortescue*, 2 Atk. 284. *Baker v. Mellish*, 11 Ves. 73, 4. S. C. MS.; but see *Dolder v. Lord*

Huntingfield, 11 Ves. 283. S. C. MS.

(z) 2 Atk. 284.

(a) *Redes. Tr. Pl.* 175.

(b) *Foy v. Penn*, 2 Bro. C. C. 280. *Price v. James*, 2 Bro. C. C. 319. *Collis v. Swayne*, 4 Bro. C. C. 480; and see *Loker v. Roke*, 3 Ves. 7. *East India Company v. Neave*, 5 Ves. 185. *Mucclstone v. Browne*, 6 Ves. 63. *Barker v. Dacie*, 6 Ves. 686. *Baker v. Mellish*, 10 Ves. 553. *Attorney-General v. Browne*, 1 Swanst. 294.

(c) Ante, 1 vol. p. 215, &c.

(d) In *Ryves v. Ryves*, 3 Ves. 347.

(e) *Hodgkin v. Longden*, 1 Ves. 2.

(f) *Abraham v. Dodgson*, 2 Atk. 157.

(g) *Abraham v. Dodgson*, 2 Atk. 157.

(g) *Morgan v. Harris*, 2 Bro. C. C. 124.

titled to relief, without being entitled to it through the Discovery, and may then obtain a Decree, though he has not established his right by the Defendant's Answer (*h*).

A Demurrer, (unlike a *Plea*,) cannot be good in part, and bad in part (*i*). If, therefore, the Demurrer extends to relief to which the Party is entitled, it will be bad, though there is some relief prayed, to which the Plaintiff is not entitled (*k*).

A Demurrer, *ore tenus*, must be to that which the Defendant has demurred to on the Record. If the cause of the Demurrer on the Record is not good, he may at the bar assign other causes; but he cannot demur *ore tenus* upon a ground which he has not made the subject of Demurrer on the Record (*l*). 287*] *And it seems, that if a Demurrer *ore tenus* is allowed, the Defendant must pay the Costs of the Demurrer on Record; for being bad, the Plaintiff was not to blame in arguing it (*m*).

A *speaking Demurrer* is bad; as where it contains argument in the body of it; if, for instance, the Demurrer says, "in or about the year 1770, which is upwards of twenty years before, the Bill filed" (*n*). A Demurrer also to any thing but what appears on the face of the Bill is considered as a *speaking Demurrer* (*o*).

Having made these few observations on Demurrers in general, we shall now observe upon the several grounds of Demurrer.

Demurrers may be, 1. For want of Jurisdiction, either because no Equity is apparent on the face of the Bill entitling the Plaintiff to relief in Equity, or because some other Court of Equity has Jurisdiction. 2. To the Person. 3. On account of some deficiency in the frame of the Bill.

1. The matters over which a Jurisdiction is possessed by Courts of Equity have been copiously treated of in the preceding parts of this work, and need not here be enlarged upon; and it is scarcely necessary to observe, that a Bill properly framed, and stating a case in which a Court of Equity gives relief, cannot be demurred to for want of Equity; but wherever 288*] no sufficient ground is shown for a *Court of Equity to interfere, the Defendant may demur for want of Equity in the Plaintiff's Case, to support the Jurisdiction of the Court.

(*h*) Attorney-General v. Brown, 1 Swanst. 294.

(*i*) Earl of Suffolk v. Green, 1 Atk. 451. 2 Atk. 388. Amb. 176. 5 Ves. 173.

(*k*) Todd v. Gee, 17 Ves. 280.

(*l*) Pitts v. Short, 17 Ves. 213. The marginal note to this Case is incorrect. Contra, Broderip v. Phillips, mentioned in Mr. Raithby's note to 1 Vern. p. 78. n. 1.

(*m*) Attorney-General v. Brown, 1 Swanst. 288; and see Tourant v. Flower, 3 P. Wms. 371. Vid. Durant v. Redman, 1 Vern. 78. Sed. vid. the Cases cited by Mr. Beames. [Beames' Orders, &c. p. 174. n. 39.]

(*n*) Edell v. Buchanan, 2 Ves. jun. 83.

(*o*) Brownwood v. Edwards, 2 Ves. 245.

Where, for instance, a Plaintiff claimed under a Will, and it was apparent upon the face of the Will, that he had no Title, a Demurrer was allowed (p).

It has already been observed, that if the Case made by the Bill be cognizable *solely* in a Court of Common Law, or in any other Court of ordinary Jurisdiction, as the Court of Admiralty, or a Court of Prize, a Demurrer will lie (q).

There may be many Cases in Bankruptcy in which a Bill is more proper than a Petition; and the Chancellor sitting in Bankruptcy frequently directs a Bill to be filed; but where after a Judgment by default in an Action upon a Dividend under a Commission of Bankruptcy, the Assignees filed a Bill for Discovery, and to have the proof of the Debt expunged, a Demurrer was allowed, the proper course of proceeding being, a *Petition in the Bankruptcy* (r).

It was observed by Sir Thomas Clarke (s), that, "in Sir John Warden's Case before Lord Talbot, there was an objection for want of Jurisdiction, and that the matter was properly triable at Law; but it being disclosed that he had filed a *Cross-Bill*, the Court did not enter into that objection, but said the Defendant had given a Jurisdiction."

Where the Wife and Executrix of an Attorney filed a Bill for Money due for business done by her *Husband, as the [*289 Defendant's Attorney, a Demurrer to the relief was allowed; as a remedy was given at Law, under the Statute of 2 Geo. 2, for the better regulation of Attornies and Solicitors (t).

If the Equity of the Plaintiff is not stated with sufficient certainty, a Demurrer lies (u); but though a Feoffment is stated to have been executed, that is sufficient, without also stating there was Livery of Seisin; and if a Bargain and Sale, or an Annuity, be stated to have been made, it is not necessary to mention the Enrolment of the Bargain and Sale, or the Registry of the Memorial of the Annuity, for in these cases the Court will presume the Deeds to be perfect, if nothing appears to the contrary (x).

So, if another Court of Equity has the proper Jurisdiction, either immediately, or by way of Appeal, the Defendant may demur to the Jurisdiction of the Court of Chancery; but Demurrers of this kind are very rare; for the want of Jurisdiction can hardly appear on the face of the Bill, at least so conclusively as is necessary, to form a ground of a Demurrer. Where *no cir-*

(p) 2 Vez. 247. Prec. Chan. 589. cit. Redeed. Tr. Pl. 125. 3d Edition.

(q) See Ante, p. 171.

(r) Clarke v. Capron, 2 Vez. jun. 666.

(s) In Burgess v. Wheate, 1 Bl. Rep. 132; and see Redeed. Tr. Pl. p. 151. 3d Edition.

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(t) Parry v. Owen, 3 Atk. 740.

(u) East India Company v. Henchman, 1 Vez. jun. 287. Mayor, &c. of London v. Levey, 8 Vez. 398.

(x) Harrison v. Hogg, 2 Vez. jun. 327, 328.

cumstance can give the Chancery Jurisdiction, as in the case of a Bill filed by way of Appeal and Review of a Decree in a County Palatine, it will not entertain the Suit even though the Defendant does not object to its deciding upon the subject (y).

If the claim of the Plaintiff is in respect of something that is 290*] unlawful, as for Money promised to a *Counsellor for advice and pains in carrying on a Suit (z), or for Money bequeathed to purchase a Dukedom (a), the Defendant may demur to the Bill.

If it appear on the face of the Bill that the Defendant has no interest in the matters in question, a discovery from him is unnecessary, as he might be examined as a Witness, a Demurrer will lie (b). This Rule and the exceptions have before been adverted to (c). Whether a Bankrupt, who may be examined as a Witness, can be made a Party to a Bill merely for a Discovery, appears doubtful; but that he cannot be made a Party to a Bill seeking relief, seems clear (d).

It is a general Rule, before alluded to (e), that a Defendant is not obliged by a discovery to subject himself to a Forfeiture, or any thing in the nature of a Forfeiture (f). If therefore goods be bequeathed to a Woman during Widowhood, she cannot be compelled to discover, if she has since married (g); but where there is a conditional limitation over of an Estate, the Demurrer will not lie to a Bill for a discovery whether the condition has been performed (h).

So, a Defendant may demur to so much of a Bill as seeks a discovery whether after institution, &c. to A., he was not pre-291*] sented to two other livings, and *instituted; for such discovery tends to show an avoidance of A. (i).

A Demurrer lies also to a Bill for the Discovery of an Assignment of a Lease without Licence, if it does not expressly wave the Forfeiture (k).

Nor will the Court compel a Defendant to discover that, which if he answers in the affirmative, will subject him to the punishment of a crime, though if he answers in the negative, it will be innoxious (l); and if the Answer may only tend to render him infamous, he is not compelled to answer (m); but he

(y) Redesd. Tr. Pl. 123, 4. 3d edit.

(z) Finch, 75.

(a) Kingston v. Pierepont, 1 Vern.

5.

(b) Dr. Steward v. East India Company, 2 Vern. 380. Griffin v. Archer, 2 Anstr. 478.

(c) See Ante. 1 Vol. p. 212; and see Whitworth v. Davis, 1 Ves. & Bea. 545. Fenton v. Hughes, 7 Ves. 288.

(d) 1 Ves. & Bea. 545.

(e) Ante, 1 Vol. 214.

(f) Boteler v. Allington, 3 Atk. 457.

(g) Monnins v. Monnins, 2 Ch. Rep. 68.

(h) Lucas v. Evans, 3 Atk. 259.

(i) Boteler v. Allington, 3 Atk. 453.

(k) Lord Uxbridge v. Staveland, 2 Ves. 56.

(l) East India Company v. Campbell, 1 Ves. 247. 8 Ves. 405. 14 Ves. 59.

(m) Ibid.

must answer, notwithstanding his Answer may cast a very great degree of reflection upon his character and conduct (n).

A Defendant, therefore, may demur to a Bill calling upon him to give an Answer as to facts which amount to *Maintenance* (o); or *Unrury* (p); *Subornation of Perjury* (q); buying of *pre-tensed Rights* within the 32 Hen. 8 (r); *ill-treatment* of Plaintiff, the Wife of Defendant (s); *Adultery* (t); *Fornication* (u); or *Simony* (x).

So where the discovery sought was relative to a **"Fruit* [*292 *Club,"* of which the Defendant was a Member, the object of which Club, (a Club of Grocers) was, to purchase all imported Fruit, a Demurrer to the Discovery was allowed (x).

A Demurrer also will lie to a discovery of *acts of Bankruptcy*, but not as to the *trading* (y).

It has been held that an Executor cannot protect himself against an Account sought by Creditors and Legatees, on the ground that the transactions were such (smuggling transactions, for instance,) that no account could have been maintained against the Testator (z); but in a more recent Case, where a Bill was filed to set aside certain transactions on the ground of Simony, and the Defendant put in an Answer refusing to make the Discovery required, as tending to Forfeiture, and afterwards died, and a Bill of Revivor was filed against his Executor, it was held he was entitled to, and was allowed, the same protection from answering as was claimed by his Testator (a).

2. If a Plaintiff is not entitled to sue by reason of any *personal disability*, the Defendant may demur. If, therefore, an Infant, or a married Woman, an Idiot, or a Lunatic, exhibit a Bill, and this appears on the face of the Bill, and no next friend or Committee is named, the Defendant may demur; and this ground of Demurrer extends to Bills for a *Discovery merely*, as well as to Bills for relief; for the Defendant in a Bill for a discovery merely, is, as *before observed, entitled to Costs, and [*293 would be injured by being compelled to answer a Bill exhibited by persons who are incapable of paying Costs (b).

Where Plaintiffs file their Bill in a Corporate Character, and

(n) Parkhurst v. Lowton, 1 Meriv. 400.

(o) Wallis v. Duke of Portland, 3 Ves. 494, and decree confirmed in House of Lords, 8 vol. Bro. Parl. Ca. p. 161. edited by Tomlins. Sharp v. Carter, 3 P. Wms. 375.

(p) Earl of Suffolk v. Green, 1 Atk. 449. S. C. 2 Eq. Abr. 79. Chancery v. Tahourdin, 2 Atk. 393.

(q) Baker v. Pritchard, 2 Atk. 387.

(r) Sharp v. Carter, 3 P. Wms. 375.

(s) Hincks v. Nelthorpe, 1 Vern. 204.

(t) Franco v. Bolton, 3 Ves. 368.

(u) Page v. Neal, 1 Vern. 107.

(x) Packhurst v. Lowton, 1 Meriv. 401.

(y) Cousins v. Smith, 13 Ves. 542.

(z) Chambers and others v. Thompson, 4 Bro. C. C. 434. Redead. Tr. Pl. 162. 3d Edit.

(a) Joy v. Campbell, 1 Sch. & Lefr. 339, affirmed on Rehearing, 2 Sch. & Lefr. 140.

(b) Parkhurst v. Lowton, 1 Meriv. 391.

(b) Redead. Tr. Pl. 124.

it appears on the face of the Bill that they are not entitled to sue in that character, a Demurrer will lie (c).

Where an Executor does not appear to have proved the Will of his Testator (d), or appears to have proved it in an improper or insufficient Court, as he does not show a complete Title to sue as Executor, a Demurrer will hold (e). But if a Plaintiff shows a complete Title, though a litigated one, or one that may be litigated, as that of an Administrator, where a Suit is depending to revoke the administration, or of an Administrator where there may be another personal Representative, a Demurrer will not hold, at least to discovery. And where a doubtful Title only is shown it is sufficient to support a Bill seeking the assistance of the Court to preserve Property in dispute pending a Litigation. Therefore, where a Suit was pending in an Ecclesiastical Court touching the Representation to a Person deceased, a Demurrer of one of the Parties to that Suit who had possessed the personal Estate of the deceased, to a Bill filed by the other Party, was dismissed (f).

3. If a Bill wants *proper Parties*, it is demurrable (unless the Bill be for a Discovery merely) and such Demurrer need not 294*] point out the Parties by *name; but it is sufficient, if the objection points out who the individuals are, by some description, enabling the Plaintiff to make them Parties (m).

We have already observed upon the necessary Parties to Bills (n).

If a Plaintiff amends his Bill, and states a matter arisen subsequent to the filing of the Bill, which consequently ought to be the subject of a Supplemental Bill or a Bill of Revivor, a Demurrer lies (o).

If a Bill be brought concerning things of *distinct natures*, against several Persons, or against one (p), it is demurrable (q); but not if *combination is charged*, unless it is denied by the Answer (r); but no more than combination should be answered, or the Answer would overrule the Demurrer (s). If *joint and separate* demands be comprehended in one Bill, it is demurrable (t); for if the Court were to allow a Plaintiff to demand by one Bill several matters of different natures against several Defend-

(c) Lloyd v. Loaring, 6 Ves. 773.

(d) Redesd. Tr. Pl. 126, but the authority he cites is not to the point.

(e) Redesd. Tr. Pl. 126. 3d edit.

(f) Redesd. 128. 3d edit.

(m) Attorney-General v. Jackson, 11 Ves. 369; and see Redesd. Tr. Pl. 146. In Pyle v. Pyle, 6 Ves. 781, the Rule was not considered as settled.

(n) Ante, p. 173, &c.

(o) Redesd. Tr. Pl. 169.

(p) Ward v. Duke of Northumberland, 2 Amtr. 469.

(q) Berke v. Harris, Hard. 337.

(r) Powell v. Arderne, 1 Vern. 416, confirmed in Lloyd v. Rattray, in Exch. 19th Nov 1788, mentioned in Mr. Raithby's note to the case in Vern.; but see Coop Tr. Pl. p. 183, and what is said Arg^o. in Brookes v. Lord Whitworth and others, 1 Madd. Rep. 87.

(s) Hester v. Weston, 1 Vern. 463.

(t) Harrison v. Hogg, 2 Ves. jun. 323.

ants, it would tend to load each Defendant with an unnecessary burthen of Costs, by swelling the Pleadings with the state of the several claims of the other Defendants, with which he has no connexion (*u*). Those Cases *where unconnected Par- [*295 ties have joined in a Suit, are where there has been one common Interest among them all, centering in the point in issue in the Cause (*x*).

If an Estate is sold in Lots to different Persons, a Plaintiff cannot include them all in one Bill for a specific performance ; there must be a distinct Bill upon each Contract (*y*).

A Vicar and a Parson cannot join in one Suit for Tithes (*z*).

Demurrers to Secondary Bills, or as they are termed, Bills not original, will be noticed, when we treat of those Bills.

Pleas.

A PLEA must be signed by a Counsel, and set down to be argued within eight days after it is filed, otherwise it is considered as abandoned (*a*), and the Plaintiff is entitled to Costs. It is, as will be seen, sometimes put in upon Oath, and sometimes not.

If a Plea be referred for impertinence, and is afterwards set down by the Plaintiff for Argument, this has been held a waiver of the reference for impertinence, notwithstanding the Defendant had attended the Master upon it (*b*).

If a Defendant submits to *Answer*, he cannot afterwards put in a Plea : but if after an Answer, the Plaintiff amends his Bill, the Defendant may, it *seems, notwithstanding his former [*296 Answer, put in a Plea to the amended Bill (*c*).

If a Plea either to part, or to the whole of the Bill is replied to, it is thereby admitted to be good if it be true ; and the validity of the Plea (though deficient in form and substance) cannot be controverted, but only the truth of it (*d*), as to which, after a Replication, the Parties may examine Witness and go to an hearing (*e*). If the Defendant proves what he has pleaded, the Bill is dismissed with Costs (*f*). If the truth of the Plea is not supported, and it extends to the Discovery sought by the Bill, the Court will order the Defendant to be examined on Interrogatories to supply the defect (*g*). Even after the Argument, and allowance of a Plea, the Plaintiff may, by filing a Replication to the Plea, oblige the Defendant to prove its truth (*h*).

(*u*) Redead. Tr. Pl. 147. 3d Edition. Hardr. 337.

(*x*) 2 Anstr. 477.

(*y*) Rayner v. Julian, 2 Dick. 677. Brookes v. Lord Whitworth and others, 1 Madd. Rep. 86.

(*z*) Gwillim, 472.

(*a*) Jordon v. Sawkins, 3 Bro. C. C. 372.

(*b*) Dixon v. Olnius, 1 Cox, 412.

(*c*) Ritchie v. Aylwin, 15 Ves. 79.

(*d*) Harris v. Ingledew, 3 P. Wms. 95. Parker v. Blythmore, Pre. Ch.

58. S. C. 2 Eq. Abr. 95, in Marg.

(*e*) Ord v. Huddleston, 2 Dick. 510.

(*f*) 3 P. Wms. 95.

(*g*) Brownsword v. Edwards, 2 Vez. 247.

(*h*) Turn. & Ven. Prac. 1 Vol. 349 ; and see Gilb. Rep. 184. Beames on Pleas, 317.

Where the Testator, had pleaded to a Bill, and died before the Plea was argued, the Executor was allowed to plead *de novo* (i).

A Bill, so far as it is not contradicted by the Plea, is taken to be true (k).

An Answer overrules a Plea, where the Defendant states by answer the same things he insists upon in his Plea (l). It seems, 297*] however, that a Defendant may, *in support of a Plea, introduce into his Answer matter in respect to which there is no charge in the Bill; as notice of a Title, or Fraud; and such Answer will not overrule the Plea; for thereby nothing is put in Issue which the Plea covers and prevents being put in Issue (m).

Pleas must be good in form and substance.

If the Plaintiff conceives a Plea to be defective in form or substance, he may take the Judgment of the Court upon its deficiency.

A Plea may be good in part, and bad in part (n), and in this it differs from a Demurrer, which as we have seen, must be good for the whole, or void for the whole (o). It seems, however that two Defences offered by a Plea, cannot be separated and one only allowed (p): and if one part of the Plea be inconsistent with the other, it will be overruled (q).

A Plea may be to the *whole* Bill, or to *part* only. If a Plea does not go to the whole Bill, it must clearly and precisely express to what part of the Bill the Defendant pleads (r); and therefore a Plea expressed to be "to such part of the Bill as are not answered," without mentioning what those parts are, has been overruled as too general (s), for in such case the Court could not know what the Plea covers without looking into the Bill (t); but if the exception is clearly stated, it is effectual (u).

298*] *Upon the Argument of a Plea, it may either be allowed simply, or the benefit of it may be saved to the hearing, or it may be ordered to stand for an Answer (x).

When a Plea covers too much, it will be ordered to stand for part, and be overruled as to part (y), or will be ordered to stand for an Answer, with liberty to except (z). The words "*with*

3. (i) *Micklethwaite v. Calverly*, For.

(k) *Plunket v. Penon*, 2 Atk. 51.

(l) *Clanrichard v. Burk*, Vin. Abr. Tit. Chancery (W. A.) 2 Atk. 155. *Gilb. Chan.* 242. Ca. 1. *Blacket v. Langlands*, 1 Anstr. 14.

(m) *Gilb. Chan.* 58, 59, cit. *Redesd. Tr. Pl.* 241. 3d edit.

(n) See 1 *Dick.* 249. *Nobkissen v. Hastings*, 4 Bro. C. C. 254. 8 Ves. 403. 11 Ves. 70.

(o) *Ib. Huggins v. York Buildings Company*, 2 Atk. 44, 155, 284. 3 Atk. 589. 1 *Vez.* 205. 6 Bro. P. C. 575.

(p) *Redesd. Tr. Pl.* 238.

(q) 4 Bro. C. C. 254.

(r) 2 Ves. 108.

(s) 3 Atk. 70. *Moseley*, 40. *Redesd. Tr. Pl.* 238.

(t) See *Salkeld v. Science*, 2 *Vez.* 107. 3 Atk. 70. *Broom v. Horsley*, *Moseley*, 40.

(u) *Howe v. Duppa*, 1 Ves. & Bea. 514.

(x) *Redesd. Tr. Pl.* 243.

(y) *Dormer v. Fortescue*, 2 Atk. 284.

(z) *Jones v. Pengree*, 6 Ves. 580.

liberty to except," are added in these cases to prevent the establishing it as a good Answer (a), as it otherwise would do (b).

A *Demurrer*, as we have seen, is proper, where the objection to the Bill is apparent on the face of the Bill; but a *Plea* or Answer must be resorted to where an objection exists, that is *not apparent* on the face of the Bill (c). A *Plea*, therefore, must aver facts to which the Plaintiff may reply, and not like a *Demurrer* rest on facts in the Bill (d).

All the facts necessary to render the *Plea* a complete equitable bar to the Case made by the Bill, so far as the Bill extends, must be clearly and distinctly averred (e), so that the Plaintiff may take issue upon it. The averment sought in general to be positive. In some cases, however, a Defendant has been permitted to aver according to the best of his knowledge and belief; as that an Account is just and true; and in all cases of negative Averments, and of Averments of facts not within the immediate knowledge* of the Defendant, it may seem im- [*299 proper to require a positive assertion (f).

The Defence proper for a *Plea* must be such as reduces the Cause to a particular point (g), which will bar the Plaintiff's demand, and then it is of use, because by having the Judgment of the Court upon that point, the Parties are saved the expense of an examination (h).

A *Plea* does not deny the Equity, but brings forward a fact, or a series of circumstances, forming, in their combined result, some one fact which displaces the Equity (i). Several Deeds may be put in issue in a *Plea*, if they draw to one conclusion (k); but the use of a *Plea* being to save *time, expense, and vexation*, it must not be *double*—it must not contain two different and distinct points, an Answer in such case being more proper (l). It has, however, been recently decided, that on application, leave may be given to plead double; as, for instance, 1st, that the Testator was not a Trader at his death; 2dly, that the Testator's Will did not charge his real Estate with the Payment of his Debts (m).

A *Plea*, good as to the *relief* prayed by the Bill, is good also to the *discovery* (n).

(a) Maitland v. Wilson, 3 Atk. 814.

(b) Sellon v. Lewen, 3 P. Wms. 239.

(c) See Redesd. Tr. Pl. 176, 7. 2d Edition.

(d) Ibid. 235.

(e) Redesd. Tr. Pl. 240. 3d Edition.

(f) Redesd. Tr. Pl. 240. 3d Edit.

(g) Chapman v. Turner, 1 Atk. 54.

(h) Anon. 2 Eq. Abr. 76.

(i) Whitbread v. Brockhurst, 1 Bro. C. C. 417, 418; and see 1 Atk. 54, and 2 Bro. C. C. 274. 1 P. Wms.

725. 3 Atk. 341. 2 Black. Rep. 1028; and see Rowe v. Teed, 15 Ves. 376.

(k) Leonard v. Leonard, 1 Ball & Beatty, 325.

(l) Anon. 2 Eq. Abr. 176: and see 1 Atk. 54, and 1 Brown. C. C. 404. 3 Anstr. 738.

(m) Gibson v. Whitehead, 30 July 1819, before the Vice Chancellor, MS.

(n) Sutton v. Earl of Scarborough, 2 Ves. 71. Hodle v. Healey, 1 Ves. & Bea. 539; and see ante, 1 Vol. 215, &c.

300*] *If a Bill of *Revivor* be filed on the Marriage of the Plaintiff, a Plea to this Bill may be filed, stating facts, a *Settlement*, for instance, which renders a *Supplemental Bill* necessary (o).

A Plea, like a Demurrer, is introduced by a protestation against the confession of the truth of any matter contained in the Bill. For the purpose of determining the validity of the Plea, the Bill, so far as it is not contradicted by the Plea, is, as before observed taken for true, and the protestation has probably been used to prevent the same conclusion for other purposes. The extent of the Plea, that is, whether it is intended to cover the whole Bill, or a part of it only, and what part in particular, is usually stated in the next place, and this as before observed, must be clearly shown. The matter relied upon as an objection to the Jurisdiction of the Court, to the Person of the Plaintiff or Defendant, or in bar of the Suit, generally follows, accompanied by such Averments as are necessary to support it. The Plea commonly concludes with a repetition that the matters so offered are relied upon as an objection or bar to the Suit, or so much of it as the Plea extends to ; and prays the Judgment of the Court, whether the Defendant ought to be compelled further to answer the Bill, or such part as is thus pleaded to. If the Plea is accompanied by an Answer merely to support it, the Answer is stated to be made for that purpose, not waving the Plea. If the Plea is to part of a Bill only, and there is an Answer to the rest, it is expressed to be an Answer 301*] to so much of the Bill as is not before pleaded to, and *is preceded by the same protestation against a waiver of the Plea (r).

Pleas in Equity are of three kinds, and are either, 1. A Plea to the Jurisdiction ; 11. A Plea to the Person ; or 111. A Plea in Bar (s).

1. A *Plea to the Jurisdiction* must show that the Lands lie, that the matters were transacted, or that the Party lives out of the Power of the Court, and the reach of its Process, *out of the Kingdom*, for instance, or in a *County Palatine*, &c. (t) ; and though the Defendant does not plead to the Jurisdiction, yet if a defect of Jurisdiction appears at the hearing, the Court will no more make a Decree than where a plain want of Equity appears (u).

If, however, the *Chamberlain of Chester* files a Bill, as he cannot be Judge in *propria causa*, it must be in Chancery (x).

(o) *Merewether v. Mellish*, 13 Ves. 435.

(r) *Redeod. Tr. Pl.* 243. 3d Edition.

(s) 1 *Eq. Abr.* 37, in *Marg. Ord. v. Huddleston*, 2 *Dick.* 510. 16 *Vin. Abr.* 361.

(t) *Ibid.* and see *Redeod. Tr. Pl.* 3d *Ed.* 182. *Nels.* 37, 66. *Car.* 60.

there cited ; and see *Gerrard v. Stanley*, *Chan. Rep.* 278. *Edgworth v. Davies*, 1 *Chan. Cases*, 40.

(u) *Peun v. Lord Baltimore*, 1 *Ves.* 447 ; and see *Green v. Rutherford*, 1 *Ves.* 470. *See. vid.* *Trelawny v. Williams*, 2 *Vern.* 484.

(x) 12 *Co.* 110.

It has been truly observed, that a Case which is not really such as will give a Court of Equity Jurisdiction, cannot easily be so disguised in a Bill, as to avoid a Demurrer (y), and render a Plea necessary.

If there is a particular Jurisdiction, but the Parties to litigate any question are both resident within the Jurisdiction of the Court of Chancery, a Plea to the Jurisdiction does not lie (z); as upon a Bill concerning* a Mortgage of the Island of Sark, [*302 both Mortgagor and Mortgagee residing in England (z). It seems, indeed, that with regard to any Contract made, or Equity, between Persons in this Country, respecting Lands in a foreign Country, particularly in the British Dominions, this Court will hold the same Jurisdiction as if they were situated in England (a).

On a Plea to the Jurisdiction, it must be shown what other Court has Jurisdiction (b); for the Court of Chancery being a superior Court of general Jurisdiction, nothing will be considered out of its Jurisdiction which is not shown to be so (c).

To a Bill respecting Chambers belonging to a Society in an Inn of Court, a Plea that the Benchers have Jurisdiction will hold (d).

A Plea of Privilege by a scholar resident at an University may be pleaded, and like most Pleas to the Jurisdiction of the Court (e), need not be on Oath (f); but a Plea of Privilege by a Defendant, Foreign Apposer in the Exchequer, it has been held, must be on Oath (g).

If a Suit is instituted against different Persons, some of whom have Privilege, and some not, a Plea *will not hold (h). [*303 Officers, therefore of the Exchequer may plead their Privilege of being sued there, but not if one of the Defendants has no such Privilege (i).

A Plea to the Jurisdiction will not lie to a Bill merely for a Discovery; for though the Court may not have Jurisdiction to give Relief, it may yet entertain a Bill for a Discovery in aid

(y) Redesd. Tr. Pl. 181.

(z) See 12 Co. 116. Dyer, 202, 716; and Cartwright v. Pettus, 2 Chan. Cas. 214. Brooks v. Oliver, Amb. 406. White v. Hall, 12 Ves. 328.

(z) Redesd. Tr. Pl. 184, who cites 1 Ves. 204. 4 Inst. 213; and see 2 Vern. 494.

(a) Lord Cranstown v. Johnston, 3 Ves. 182, 3, and the Cases there mentioned.

(b) 1 Vern. 59. Earl of Derby v. Duke of Athol, 1 Ves. 203; and see 1 Ves. jun. 388. Nabob of Carnatic v. East India Company, 2 Ves. jun. 371, and 8. C. 3 Bro. C. C. 301. Stode v. Little, 1 Vern. 58. 3 Atk.

662. 1 Ves. 78, 464. 2 Bro. C. C. 240.

(c) Redesd. Tr. Pl. 183, who cites 1 Ves. 204. See also Beames on Pleas, 9.

(d) 2 Bro. C. C. 240.

(e) Order in Chan. 96.

(f) Pratt v. Taylor, 1 Ch. Cas. 237. S. P. ibid. 258. This subject is much and learnedly considered in 2 Vol. of Life of Sir Leol. Jenkins, 655; and see 2 Ventr. 362.

(g) Gibson v. Whitacre, 2 Vern. 83.

(h) Redesd. Tr. Pl. 240.

(i) Fanshaw v. Fanshaw, 1 Vern. 246. Hutton, 59.

of the Court which can give Relief, if the same Discovery cannot be there obtained; as if the Jurisdiction be in the King and Council, where the Defendant is not compellable to answer upon Oath (*k*).

To an Information, a Plea may be put in that a Visitor capable of doing complete justice has Jurisdiction to decide the matters in question (*l*).

11. A Plea to the Person must show that the Party is disabled to sue, and is in the nature of a Plea of Abatement at Law (*m*).

A Plea of Outlawry is good so long as the Outlawry remains in force, unless the Plaintiff sue in *autre droit*, as Executor or Administrator (*n*), or as *prochein Amy* (*o*), or is merely named as Relator in an Information, and does not therein sustain the character of Plaintiff (*p*), or the Outlawry took place in an Action 304*] in regard to the same duty, or *thing for which Relief is sought by the Bill (*q*). Outlawry in *Chester* or *Durham* cannot be pleaded to a Suit in the Courts of *Westminster* (*r*), but if in *Lancaster*, it seems it may (*s*).

This Plea, it has been held, must be put in on Oath (*t*); but the majority of the Decisions seem to the contrary (*u*). The Outlawry must be pleaded *sub pede sigilli* (*x*).

In the *Exchequer*, a Plea of Outlawry must be set down by the Defendant; but the practice of the Court of Chancery is different (*y*).

So, a Defendant may plead that the Plaintiff has been *attainted* in a *Præmunire* of treason or felony (*z*), or of an offence which occasions a *Forfeiture*, as *Manslaughter*; but a Plea to the Person, in respect of a conviction for a capital offence, is judged of with equal strictness as if it were a Plea at Common Law (*a*). A Person attainted cannot be heard as a Suitor in a Court of Justice in prosecution of a Civil Right, but only for the mere purpose of reversing the Attainder (*b*).

A Plea of the Plaintiff's conviction for a Felony, to a Bill by a Residuary Legatee for an Account, the Testatrix having 305*] died after the Conviction, but before *sentence of

(*k*) Redesd. Tr. Pl. 183.

(*l*) 3 Atk. 662. 1 Ves. 78, 464, 474, cited in Redesd. Tr. Pl. 184.

(*m*) 13 Ves. 437.

(*n*) Killigrew v. Killigrew, 1 Vern. 184.

(*o*) Coop. Tr. Pl. 244.

(*p*) Redesd. Tr. Pl. 185. 3d Edit. and note (D.) The Case of Attorney-General v. Heath, Prec. Chan. 13, is, however, strong to show, that a Relator interested in the Information is liable to a Plea of Outlawry.

(*q*) Phillips v. Gibbons, 18 Ves. 184.

(*r*) Co. Litt. 128a.

(*s*) Fisher v. Batten, 1 Vent. 155.

(*t*) Parrot v. Bowden, 1 Vern. 37.

(*u*) See Pratt v. Taylor, 1 Ch. Cas. 237. S. P. 258, and Took v. Took, 2 Vern. 198. Bacon's Tracts, 290.—Masters v. Bruet, 2 Freem. 143; and see Ord in Ch. Beames' Edit. 175.

(*x*) Attorney-General v. Heath, Prec. Ch. 13.

(*y*) Chapman v. Lansdown, 2 Anstr. 554.

(*z*) Redesd. Tr. Pl. 185.

(*a*) Burk v. Browne, 2 Atk. 399.

(*b*) See Ex parte Bullock, 14 Ves. 442.

Transportation completed, was allowed, though put in without Oath (c).

A Defendant may also plead, that the Plaintiff is not the Person he pretends to be, or has no right to the character he assumes (d).

If, for instance, a Plaintiff sues as Heir or Administrator, it may be pleaded that he is not Heir (e), or Administrator (f), or that the supposed Intestate is alive (g).

If a Bill is filed in the name of any Person incapable of instituting a Suit alone, as by an Infant (h), married Woman (i), or an Idiot or Lunatic, found such by inquisition (k), the Defendant may plead the Infancy, the Coverture, or the inquisition of Idiocy or Lunacy, in abatement of the Suit (l). If the disability in these cases appears on the face of the Bill, a Demurrer is proper; if not, a Plea must be resorted to.

So, the Bankruptcy of the Plaintiff (m), or an Assignment under the Insolvent Debtor's Act, may be pleaded, if the subject matter of the Suit arose *before the Bankruptcy, or Assignment [*306 (n). A Plea of the Plaintiff's Bankruptcy must be upon Oath (o), and must aver distinctly, and in succession, the facts upon which the Bankruptcy rested; it is not sufficient merely to state that the Plaintiff was duly found a Bankrupt under the Commission (p).

However the Law may originally have stood, it is now settled that alien Friends are entitled to institute Suits in the King's Courts for the Recovery of their rights (q). A foreign Sovereign, acknowledged by the Government of this Country, may file a Bill here (r).

A Plea, therefore, that the Plaintiff was an Alien born, and an Alien Infidel, is not effectual to a Bill for a personal demand (s); but the Plea of Alienage to be effective must aver that, the

(c) ——— v. Davies, 19 Ves. 81.

(d) See Wyatt's Pract. Reg. 376.

(e) Kinnerley v. Simpson, For. Rep. 85; see this doctrine considered ante, 1 vol. p. 300, in note (y.) where the Cases are referred to.

(f) Winn v. Fletcher, 1 Vern. 473.

(g) Ord v. Wilkinson, Forest's Rep. 90. S. C. affixed to under the name of Ord v. Huddleston, Redd. Tr. Pl. 2d edit.

(h) Offey v. Jenney, 3 Cha. Rep. 51. S. C. Nels. 44.

(i) Coop. Tr. Pl. 24, 163.

(k) Ridler v. Ridler, 1 Eq. Cas. Abr. 479.

(l) Redd. Tr. Pl. 188, who cites, Pract. Reg. 266; and see Bonner v. Twiss, Fokiff, 130.

(m) Redd. Tr. Pl. 190. 2d edition. Benfield v. Solomon, 9 Ves. 77; but see Lowndes v. Taylor, 1

Madd. Rep. 423, confirmed on appeal by the Lord Chancellor.

(n) 1 Anstr. 101.

(o) 2 Cox, 44.

(p) Carleton v. Leighton, 3 Meriv. 667.

(q) Daughbigny v. Davallon, 2 Anst. 462.

(r) City of Berne v. Bank of England, 9 Ves. 347. Dolder v. Bank of England, 10 Ves. 352. Dolder v. Lord Huntingfield, 11 Ves. 283. 1 Vez. 373. Nabob of Carnate v. East India Company, 1 Ves. jun. 371; these Cases overrule the doubts expressed in Barclay v. Russell, 3 Ves. 431.

(s) Ramskissment v. Barker, 1 Atk. 50. If the demand be of Land, or of a mixed nature, as, Land and money, it seems a Plea of Alienage would hold. See Beames on Pleas, 114.

Plaintiff is an *Alien Enemy* (t) ; and such a plea will hold to a Bill of Discovery only, as well as to Bills praying relief (u). But an Alien, though in amity, cannot sue in respect of *Land*, or even in respect of a demand of a mixed nature, partly real and partly personal (x). If the Subject of a neutral Country resides in an Enemy's Country, and carries on a Trade there, he 307*] is an enemy *Merchant, and a Plea of Alien Enemy holds (y) ; and if a *Consul*, or a Person having even higher privileges, residing in an Enemy's Country, embarks in mercantile transactions, his individual character is not merged in his national character, which cannot protect him from the consequences of those transactions ; and it is the habit not only of this Country, but of others, to confiscate, as Enemy's Property, the Goods of such Persons (z).

If an Alien Enemy is resident here *by the permission of the Government*, the Plea cannot, it seems, be sustained (a).

The Defendant may also plead that the Plaintiff is *excommunicated* ; a fact, which must be certified by the Ordinary, *sub sigillo* : and the Plea holds, though the Plaintiff sues in *autre droit*, as Executor, or Administrator. This Plea, like the Plea of Outlawry ceases to be a bar when the disability is removed (b). It is not put in upon Oath (c).

111. *Pleas in Bar* are either to the Relief prayed, or to the Discovery. When the Defendant pleads in bar, the Plaintiff must either set down the Plea to be argued if he thinks it not good in Law ; or, if he thinks it good, but denies the fact pleaded, he must reply to it, and put the facts of the Plea in issue ; by replying, he thereby admits the Plea to be good in 308*] *point of Law, supposing it to be true (d). Pleas in bar to Relief will first be considered ; they are, 1. An Act of Parliament ; 2. A Matter of Record ; 3. Matters in Pais.

1. Any *Statute*, public or private (e), which is a bar to the Plaintiff's demands, may be pleaded, with the Averments necessary to bring the case of the Defendant within the Statute, and to avoid an Equity which may be set up against the Bar created by the Statute (f).

A Plea of the Statute 32 Hen. 8, c. 9, against selling pre-

(t) *Burk v. Brown*, 2 Atk. 397. See the Form of such a Plea, 2 Ves. & Bea. 324.

(u) *Daughbigny v. Davallon*, 2 Anstr. 462 ; but see a Decision contra in *Exchequer*, noticed in *Albrecht v. Sussman*, 2 Ves. & Bea. 324, 326, 328.

(x) *Co. Litt.* 29b.

(y) *Albrecht v. Sussman*, 2 Ves. & Bea. 323.

(z) *Ibid.* p. 328.

(a) *Spurenburgh v. Bannatyne*, 1 Bos. & Pull. 163. *O'Connell v. Heate*, 3 Bos. & Pull. 113. *De*

Luneville v. Phillips, 2 New. Rep. 97. *O'Mealy v. Wilson*, 1 Camp. 482. These are Cases at Law, but the doctrine of Courts of Law and in Equity is the same in these Cases.

(b) *Redesd. Tr. Pl.* 186, 7. 2d edition.

(c) *Beames on Pleas*, p. 109, and the Authorities there cited.

(d) See *Anon.* 1 Serj. *Wilson's Rep.* 82.

(e) *Brown v. Hammond*, 2 Ch. Cas. 249.

(f) *Redesd. Tr. Pl.* 214, 2d edit.

tensed or controverted Titles, with an Averment that the Defendant "had not been in Possession within a year before the Lease or Mortgage alleged by the Bill to have been made," has been holden good (*g*); but the Plea must be on Oath, nor is the necessity for this waved by the Plaintiff's setting down the Plea (*h*).

A Defendant may plead in bar to a Bill by a Lessee of the Parson, for the Discovery of Tithes, the Stat. 13 Eliz. 3. 20, s. 1, against *Non-residence* (*i*).

The *Statute of Limitations* (*k*) may in many cases be pleaded in an equitable demand; for though the words of it do not apply to *equitable* demands, yet Equity adopts it, or at least, takes the same limitation *in cases that are analogous to those *[309 in which it applies at Law (*l*); but no advantage can be taken of the Statute unless it is pleaded, or insisted upon by the Answer (*m*).

If the Bill charges a Fraud, and that the Fraud was not discovered until within six years before filing the Plea, the Statute is not a good Plea, unless the Defendant denies the Fraud, or avers that the Fraud, if any, was discovered within six years before the filing of the Bill (*n*).

There is no Statute of Limitations to bar a legal *Rent-charge*. In Equity, therefore, such a Bar is never permitted (*o*). But from length of time presumptions may be raised which may exclude the demand, after long acquiescence; but not where all presumption of Release or Payment is excluded (*p*). The Statute of Hen. 8, concerns only *Customary Rents* between Lord and Tenant (*q*).

In a Case where the Testator died in 1786, and the Probate of his Will was not taken out till 1802, the Executor was allowed to plead the Statute of Limitations to a Bill by a Creditor filed in 1803, because the Defendant had possessed the personal Estate in 1792, and therefore might have been sued as Executor *de son tort* (*r*).

It has been held, that a Bill depending six years *in [*310 Chancery is not sufficient to take the Debt out of the Statute of Limitations (*p*); and so it is where the Bill is dismissed (*q*); but if a Party is stayed by Injunction, it is otherwise (*r*).

(*g*) *Hitchins v. Lander*, Coop. 34, where the form of the Plea is given; and see *Wall v. Stubbs*, 1 Madd. Rep. 80.

(*h*) *Wall v. Stubbs*, 2 Ves. & Bea. 354.

(*i*) *Quilter v. Mussendine*, Gilb. Eq. 228. The Law as to Non-residence hath since the time of Elizabeth been much altered, but the same principle of Pleading applies.

(*k*) 21 Jac. 1 c. 16.

(*l*) *Stackhouse v. Barnston*, 10 Ves. 466, 7, 2 Bur. 961.

(*m*) *Prince v. Heylin*, 1 Atk. 493.

(*n*) *Redesd. Tr.* Pl. 218. 2d edit. and 3 P. Wms. 309. 2 Atk. 395. *Gilb. Ch.* 61. 3 Bro. P. C. 305, there cited; and see ante, 1 vol. 257.

(*o*) 10 Ves. 467; and see *Collins v. Goodhall*, 2 Vern. 235.

(*p*) *Stackhouse v. Barnston*, 10 Ves. 469.

(*q*) 2 Vern. 236.

(*r*) *Webster v. Webster*, MS. S. C. 10 Ves. 93.

(*p*) *Anon.* 2 Atk. 1. *Contra Anon.* 1 Vern. 73.

(*q*) *Anon.* 2 Chan. Cas. 217.

(*r*) *Ibid.*

We have already touched upon the Cases in which the Statute of Limitations is a bar. It cannot, in most instances, be pleaded in bar of an Account (s); nor is it pleadable to a Bill for an Account of the arrears of an Annuity or Legacy (t), or where money is lent or delivered in Trust (u).

The Statute of Limitations may be pleaded to a Bill brought to redeem, if the Mortgagee hath been in possession twenty years (x); or it may be *Demurred* to, where the objection appears on the face of the Bill (y).

If a Bill states facts amounting to the *acknowledgement* of a Debt within the six years, a mere Plea of the Statute is insufficient (z); and the charges in the Bill of such acknowledgement must be answered; but whether by way of averment in the Plea, as well as in the Answer, has been doubted (a). In rev-311*] eral cases it was held, that to take a Case out of the Statute there must not only be an admission of the Debt, but an express Promise to pay (b); but the more modern Decisions seem to have overruled that doctrine (c).

It has been holden, that the Statute of Limitations, thought pleadable to the Debt, is not as to a discovery, *when the Debt was due* (d); but this doctrine may be doubted (e).

If an Executor, or Administrator, or a Trustee for an Infant, neglect to sue within six years, the Statute of Limitations binds (f).

A Corporation is entitled to the benefit of the Statute of Limitations in the same manner as private Persons (g).

To a Bill, on an equitable Title to present to a Living, seeking to compel the Defendant to resign, *plenarty* for six months before the Bill was filed may be pleaded in bar; the Statute of

(s) Anon. 2 Freem. 22; see ante, 1 vol. p. 98, 9.

(t) Higgins v. Crawford, 2 Ves. jun. 572. Parker v. Ash, 1 Vern. 257. Anon. 2 Freem. 22. Smallman v. Lord Hamilton, 2 Atk. 71.

(u) Warner v. Conduit, East. 6 G. 2. 1733. MS.; and see Heath v. Henley, 1 Chan. Cas. 20, and Sheldon v. Wildman, *ibid.* p. 26. Milnes v. Cowley, 4 Price, 103.

(x) Redesd. Tr. Pl. 213. 2d edit. who cites 3 Atk. 225, 6, and the authorities there referred to. See Blewitt v. Thomas, 2 Ves. jun. 669, where a Plea was allowed after forty years possession.

(y) Redesd. Tr. Pl. 213. 2d edit.; and see ante, 1 vol. p. 519, 520.

(z) Baillie v. Sibbald, 15 Ves. 185. S. C. MS.

(a) Bayley v. Adams, 6 Ves. 586. In Redesd. Tr. Pl. 219, 3d edition, it is said there must be an Averment

and an Answer. See on this subject Anon. 3 Atk. 70.

(b) See what is said in Lacon v. Briggs, 3 Atk. 107.

(c) Yea v. Fouraker, 2 Burr. 1099. Cowp. 548, and the recent Cases mentioned in the argument of Baillie v. Sibbald, 15 Ves. 185.

(d) Mackworth v. Clifton, 2 Atk. 51.

(e) In Baillie v. Sibbald, the Lord Chancellor according to my MS-note, expressed a doubt whether the Statute of Limitations could be pleaded to a mere Bill of Discovery. The same Case is reported in 15 Ves. 185, but no notice is there taken of that doubt. See Sutton v. Earl of Scarborough, 9 Ves. 71, noticed and animadverted upon, Redesd. Tr. Pl. 213; and see Earl of Bredalbane v. Earl Cathness, Dom. Proc. 1721.

(f) Wych v. East India Company, 3 P. Wms. 309.

(g) *Ibid.*

Westminster the Second (h) being considered, for this purpose, as a Statute of Limitation in bar of an equitable, as well as, a legal right. But if a *quære impedit* is brought before *the [*312 six months are expired, though the Bill is filed after, it may be in some cases a ground for the Court to interfere (i), and, consequently, *plenarty* would not in such Cases be pleadable in bar (k). It seems, however, doubtful, if a Plea of *Plenarty* will hold to a Bill seeking possession of a *Donative Living* (l).

A Plea of the *Statute of Frauds* (m) in answer to a Bill for the specific Performance of an Agreement, will hold, and hath before been adverted to (n). But this Plea, with an Averment of no Agreement in Writing, but silent in respect of collateral circumstances charged as Evidence of it, has been overruled (o).

This Statute may also be pleaded to a Bill for the discovery and execution of a Trust, with an Averment that there was no declaration of the Trust in Writing (p), unless it be a secret Trust, in fraud of an Act of Parliament (q).

2. A *final Decree* (r) signed and enrolled (s), or an Order of the Court, may be pleaded, by which the rights of the Plaintiffs in that Bill, or of those under whom they claim, have already been conclusively determined.

So, a Decree or Order dismissing a former Bill for the same matter may be pleaded in bar, to a new Bill, *if the Dis- [*313 mission was upon the hearing, and was not in terms directed to be without prejudice (u).

If a Decree of Dismission of a former Cause for the same Matters be pleaded in bar, the Plaintiff may apply for a Reference to the Master to state whether there is such a Decree, but if without such a Reference he sets down his Cause, it is a waiver of the Reference, and the Court will determine it (x).

If however, a Cause is not heard on the merits, and the circumstances discussed, but is dismissed on the hearing for want of the Plaintiff's Appearance, such Decree, it seems, could not be pleaded (y); for such dismission is not *res judicata*, an absolute determination of the Court that the Plaintiff had no Title (z); and though a Bill be dismissed on the merits, yet if by the Plaintiff's gaining the legal Estate the Defendant is compelled to

(h) 13 Edw. 1. c. 5.
(i) *Gardiner v. Griffith*, 2 P. Wms. 496. 3 Atk. 550.
(k) *Redesd. Tr. Pl. 221*.
(l) *Mutter v. Chauvel*, Clerk, and others, 1 Meriv. 475.
(m) 29 Car. 2 c. 3.
(n) *Ante*, 1 vol. 382.
(o) *Evans v. Harris*, 2 Ves. & Bea. 361; and see *Jones v. Davis*, 16 Ves. 302.
(p) 2 Atk. 156.
(q) See *ante*, 1 vol. 372, &c.
(r) See 2 Vez. 450.

(s) That it must be enrolled to be pleadable, see *Anon.* 3 Atk. 626, 809. *Kinsey v. Kinsey*, 2 Ves. 577; but see *Prettyman v. Prettyman*, 1 Vern. 310. A Decree, though not signed and enrolled, may be insisted on by way of Answer, 2 Ves. 577.
(u) *Redesd. Tr. Pl. 194*, and the Cases there cited.
(x) *Morgan v. Morgan*, 1 Atk. 53.
(y) *Picket v. Loggon*, 14 Ves. 232.
(z) *Brandlyn v. Ord*, 1 Atk. 571; and see *Redesd. Tr. Pl. 194*, who cites: *Vern. 310. 1 Bro. P. C. 281*.

file an original Bill as Plaintiff, the Decree of Dismission cannot be pleaded (a).

A Decree in a former Suit cannot be pleaded to a Bill for the Tithes of a subsequent year (b).

A Plea of a former Decree for the payment of Tithes, where a Modus and the Lands alleged to be covered by it were imperfectly stated, so that the Court could not direct an Issue, was held not to be a bar to a Bill brought to establish the Modus (c).

314*] In support of a Plea of a former Decree it is *necessary to set forth so much of the first Bill and Answer as will show the same point was then in issue (d).

A Plea of a Sentence in the Ecclesiastical Court. *ex directo*, in a matter properly cognizable there, appears to be conclusive, where the same matter comes in question collaterally in a Court of Equity (e).

A Judgment in a Court of ordinary Jurisdiction which has finally determined in the Rights of the Parties, may, in general, be pleaded in bar of a Suit in Equity (f); and a sentence of a foreign Court having Jurisdiction, may be used as a Defence by way of Plea (g); but a Plea of a foreign Sentence in a *Commissary Court* in France, relating to the same matters for which the Bill was brought here, was overruled, that Court not having Jurisdiction to determine Rights of the Parties (h).

If there is any charge of Fraud, or other circumstances shown as ground for relief, the Decree, Judgment (i), or Sentence, cannot be pleaded, unless the Fraud, or other circumstance, in the Decree, Judgment, or Sentence sought to be impeached, be denied by Averment in the Plea, and thus put in issue by the Plea, and the Plea supported by a full Answer to the charge in the Bill (k).

315*] *A Plea of a former Suit depending in the same, or another Court of Equity, for the same Cause, unless it was brought in a different Right (l), or except, perhaps, in the Case of a Suit depending in an inferior Court of Equity, the effect of which the Defendant has avoided by going out of the Jurisdic-

(a) *Sawyer v. Bletsoe*, 2 Vern. 229.

(b) Minor Canons of St. Paul's v. Crickett, 1 Wight. 30.

(c) *Collins v. Gough*, 7 Bro. P. C. 94. Tomlin. Edit.

(d) *Child v. Gibson*, 2 Atk. 603. 2 Ves. 577.

(e) *Meadows v. Duchess of Kingston*, Ambl. 756. 2 Vern. 3, 76. 2 Ch. Cas. 178. 1 P. Wms. 289 2 P. Wms. 286.

(f) *Redesd. Tr. Pl. 206*. 3d edit. and the case of Sidney styling himself Earl of Leicester v. Perry, in Ch. 23d July 1783, there stated. S. C. 1

Bro. C. C. 315; and see 2 Atk. 223.

(g) 3 Atk. 223.

(h) *Gage v. Bulkeley*, 3 Atk. 214.

(i) See as to relief in cases of fraudulent verdicts and judgments, ante, Vol. 1. 300.

(k) See 12 Ves. 205. 7 Ves. 586. *Brandish v. Gee*, Ambl. 229. *Contra* 1 Anst. 59, 97; but see the remarks on the Cases in the Exchequer, *Redesd. Tr. Pl. 195*, in note (E.) and as to the necessity of Averments in the Plea, and the Support of the Plea by Answer, *ibid.* 195 to 200, and p. 203.

tion of that Court (*m*), is a good Plea, and need not be on Oath (*n*). Such Plea ought not to be set down (*o*); but the Plaintiff is bound to procure a Reference to the Master to ascertain the facts, and a Report within a Month after the Plea is filed, otherwise, at the instance of the Defendant, the Bill will be dismissed (*p*). If the Master reports the fact of another Suit depending, the Bill stands instantly dismissed (*q*), unless exceptions are taken to the Report, and the same are allowed (*r*). No Suit is considered as depending, until the Defendants have appeared, or been served to appear (*s*).

The pendency of a Suit at Common Law cannot be pleaded in bar of a Suit in Equity (*t*); nor is a Plea of a Suit depending in the court of *Ireland* for the same matter, a good Plea (*u*).

*After a Bill brought in the Exchequer to foreclose, [*316 the Defendants may bring a Bill in Chancery to redeem, and the pendency of the former Suit is not pleadable (*u*).

It seems that a like Suit in the Court of Chancery in *Jamaica* may be pleaded to a Suit in this Country, if it be set out with certainty as to the year and term in which it was instituted (*x*).

If a Creditor comes in before the Master under a Decree, he is *quasi* a Party to that Suit; and if he brings a new Bill a Plea of a former Suit depending will hold (*y*). The proper way for a Creditor in such a situation to proceed, if the Plaintiff in the original Suit is dilatory, is by Application to the Court for liberty to conduct the Cause (*z*).

In a Plea of Title derived from one having only a reversionary Estate, and not in Possession, it must set out how the Person from whom the Title was deduced became entitled (*a*).

A Plea of a *Fine* and *Non-claim* with proper Averments, may be pleaded in bar of a Suit (*b*). In such a Plea, a direct positive Averment of Seisin is necessary, and it must not be alleged argumentatively, as, "that the Party being in possession and receipt of the Rents, and thereby seised of the Rents, &c." (*c*).

(*l*) *Huggins v. York Buildings Company*, 2 Atk. 44.

(*m*) 3 Atk. 587.

(*n*) *Umlin v. Hudson*, 1 Vern. 338.

(*o*) See *Ibid.* Anon. 1 Ves. jun. 484; and see *Daniel v. Mitchell*, 3 Bro. C. C. 544. If the Plaintiff sets down the Plea to be argued he admits the truth of the plea, and the same will be allowed, *Umlin v. Hudson*, 1 Vern. 332. unless it is defective in form [See 2 Atk. 589.]

(*p*) *Baker v. Bird*, 2 Ves. jun. 672.

(*q*) 1 Ch. Cas. 241.

(*r*) See 1 Vern. 332, 3 Atk. 587.

(*s*) *Moor v. Welsh Copper Company*, 1 Eq. Abr. 39.

(*t*) 3 P. Wms. 190, cited *Redesd. Tr. Pl.* 204. The Party in such case

may be put to an election. See *tit. Election*.

(*u*) *Lord Dillon v. Alvares*, 4 Ves. 367.

(*v*) *Earl of Newbury v. Wren*, 1 Vern. 220.

(*x*) *Foster v. Wasaall*, 3 Atk. 586.

(*y*) *Neve v. Weston*, 3 Atk. 557.

(*z*) *Redesd. Tr. Pl.* 203.

(*a*) *Hughes v. Garth, Amb.* 421. S. C. 2 Eden, 168.

(*b*) *Redesd. Tr. Pl.* 204. 3d edit.

(*c*) *Dobson v. Leadbeater*, 13 Ves. 230, which overruled 3 Bro. C. C. 80; and 1 Ves. 136. *Page v. Lever*, 2 Ves. jun. 450. *Story v. Windsor*, 2 Atk. 630, 633. In some cases such strictness does not seem to have been thought necessary. See *Butler v.*

317*] It is not, however, requisite to aver that *the Vendor was seised in Fee ; an Averment that he was seised *ut de libero tenemento*, and being so seised a Fine was levied, will be sufficient (d). The same strictness is required in pleading a Fine in Equity as at Law.

A Fine levied pending a Suit in Equity has not been allowed to prejudice the legal Title (e).

A Plea of a *Conveyance*, *Fine*, and *Non-claim* to a Bill impeaching the Conveyance for want of a valuable consideration, is a good Plea, and is not considered as multifarious (f).

It is not necessary to enter into the general learning as to Fines, or into the distinctions respecting Fines good at law, but not binding in Equity (g). The doctrine as to Fines founded in *Fraud* (h), and Fines levied by one with notice of a Trust, has before been observed upon. It is sufficient here to observe, that a Fine effective in Law and Equity may be pleaded.

A *Recovery* duly suffered with the Deed to lead the Uses, may be pleaded to a Claim under an Entail destroyed by such Recovery (i).

The general doctrine as to legal and equitable Recoveries (k) is sometimes treated of under this head by writers on Equity Pleading, but not necessarily so, nor will it here be considered.

318*] *3. We now come to the consideration of Pleas of Matters in *Pais*. Pleas in bar, of any Matter of Record, or of Matters recorded, or as of Record in the Court itself, or any other Court, need not be upon Oath (l).

Pleas in bar, of Matters in *Pais* only, sometimes apply both to the Discovery sought, and to the Relief prayed by the Bill, or by some part of it ; sometimes only to the Discovery, or part of the Discovery ; and sometimes only to the Relief, or part of the Relief (m). A Plea of an *Award* (n) is not only good to the Merits of the Case, but to the Discovery (o), unless *Fraud* or *Concealment* be charged (p), in which case the Defendant should not only plead the Award, but should also by Answer deny the imputation of Fraud (q). This subject has already been consid-

Every, 1 Ves. jun. 136, and S. C. 4. 3 Bro. 80, and the observation in note (a) to 13 Ves. 234.

(d) 2 Atk. 630, cit. Redced. Tr. Pl. 206, 3d edit.

(e) Hopkins v. Bond, 1 Sch. & Lefr.

432. Pinke v. Thornycroft, 4 Bro. P. C. 92. 2d. edit.

(f) Doble v. Cridland, 2 Bro. C. C. 274.

(g) See ante, 1 vol. 211, 212, as to Fines.

(h) Ante, 1 vol. p. 211, 212.

(i) Redced. Tr. Pl. 206, 3d edition, who cites 1 P. Wms. 754. Salkeld v. Salkeld, 1763, before Lord Northing-

ton, Brown v. Williamson, Trin. 1792, before Lord Bathurst.

(k) As to equitable Recoveries, see ante, 1 vol. p. 454, 5.

(l) Redced. Tr. Pl. 243. 3d edition.

(m) Ibid. 210.

(n) See ante, 1 vol. 80, on this subject.

(o) Tittensen v. Peat, 3 Atk. 629 : and see Lingood v. Eade, 2 Atk. 501.

(p) South Sea Company v. Bumpstead, 2 Eq. Ca. Abr. 80.

(q) See 6 Ves. 599, and Gartside v. Gartside, 3 Anstr. 736 ; but see Pope v. Bish, 1 Anstr. 59. Edmondson v. Hartley, ib. p. 97. Rybott v.

ered in a former part of this Work (r) ; it does not appear to be clearly settled by the Decisions.

A Plea to a Bill of Discovery, that by Articles, all *Disputes* were agreed to be referred, is insufficient (s).

*A *Release*, a *Compromise* (t), or a *Stated Account*, may [*319 be pleaded in bar ; but if a Bill be filed to set aside an Agreement and a Release, charging Imposition and Duress, it is not sufficient to plead the Agreement and Release, but the Defendant must also by Answer deny the fraud and Duress (u).

In a Plea of a Release the Defendant must set out the consideration upon which the Release was made (x). A Person out of Possession cannot in Law convey any thing to a Stranger ; he can only give a *Release* to one in Possession ; and the Law has wisely provided this, in order to quiet Possessions (y). The acceptance of a Release of a Right is in no case an acknowledgement that a Right existed ; it amounts only to this ; " I give you so much for not seeking to disturb me." If it were an admission of Right, it must always be liable to objections, because the consideration for the Release is always much less than the value of the thing demanded ; but in truth the consideration given, being less than the value of the thing demanded, the transaction amounts to a denial of Right, instead of an acknowledgement (z).

A Plea of a Release or a stated Account, to a Bill for an Account, has before (a) been observed upon ; and also in what manner Releases are affected by *Fraud (b). Pleas in [*320 bar of Matters in *Pais* are put in on Oath (c).

A Plea of *want of Parties* may be used in bar to a Bill, and goes to the whole Bill,—to the Discovery and Relief (d). We have before treated of the necessary Parties to Bills. If the want of Parties appears on the face of the Bill, it is *demurrable* ; if not, it is the proper subject of a *Plea*. But it is observable, that neither a Demurrer or Plea will lie for want of Parties to a Bill merely of Discovery (e).

Barrel, 2 Eden, 231. See *Champion v. Wenham*, Ambl. 245, on this subject.

(r) 1 Vol. p. 295, &c.

(s) *Mitchell v. Harris*, 2 Ves. jun. 129. S. C. 4 Bro. C. C. 311. *Hill v. Hollister*, 1 Wils. 129. *Street v. Rigby*, 6 Ves. 817 ; and *Waters v. Taylor*, 17 Ves. p. 14 ; and also *Willington v. Mackintosh*, 2 Atk. 769. These Cases overrule *Halfhide v. Fenning*, 2 Bro. C. C. 336. S. C. 2 Diok. 702. Redef. Tr. Pl. 214 ; and see on this subject *Tattersal v. Groote*, 2 Bos. & Pull. 135.

(t) *Leonard v. Leonard*, 1 Ball & Beatty, 328.

(u) *Freeland v. Johnson*, 1 Anstr. 276 ; and see on this subject, *Bayley v. Adams*, 6 Ves. 586.

(x) Redef. Tr. Pl. 211. 3d edit. *Roche v. Morgett*, 2 Sch. & Lefr. 728.

(y) *Underwood v. Lord Courtown*, 2 Sch. & Lefr. 65. Plowd. 88.

(z) 2 Sch. & Lefr. 68.

(a) *Ante*, 1 Vol. p. 100. As to accounts between Mortgagor and Mortgagee, see *ante*, 1 vol. 532.

(b) 1 vol. 299.

(c) Redef. Tr. Pl. 243, 3d edit.

(d) *Plunket v. Pencon*, 2 Atk. 51.

(e) Redef. Tr. Pl. 163, 221. 2d edit.

Upon arguing a Plea of this kind, the Court instead of allowing it, usually gives the Plaintiff leave to amend his Bill upon Payment of Costs (*f*).

Pleas in bar of a Discovery, are, 1. That the Discovery may subject the Defendant to a Penalty, or will be a breach of confidence; 2. That the Defendant is a Purchaser for a valuable consideration; 3. That the Defendant has no interest in the subject of a Suit.

1. The doctrine as to discovering what may subject the Party to a Penalty has before been considered (*g*), nor is it necessary to enlarge much further on the subject. Disclosures which would be a breach of confidence have also been adverted to (*h*).

A Defendant has a right to insist that he is not to be compelled to answer, not only the broad and leading fact, but any fact, 321*] the Answer to which may *furnish a step in a Prosecution, if any Person should choose to indict him.

If a Bill states the Marriage of the Defendant with a particular Woman, he may plead that she is his Sister, and may refuse to state any thing more, or answer as to any one fact forming a link in the chain (*i*). So where there had been a Transfer of Stock, under an Agreement to satisfy the deficiency in the Accounts of a Banker's Clerk, this was considered as amounting to a Composition of Felony, to prevent a Prosecution; and that the Defendant might by Plea protect himself from a Discovery (*k*).

But the Allegation by a Defendant, that an Answer may subject him to a supposed Crime, does not prevent Relief in Equity; and therefore in a case of *Usury* or *Forgery*, if proof can be made of it, the Court will let the Cause proceed to an hearing, and direct an Issue, though it will not oblige the Paaty to give a Discovery (*l*).

11. Where two Persons have an equal claim to protection, the Court will not interpose (*m*). A Plea, therefore, of a Purchaser for a valuable consideration, without notice of the Plaintiff's Title, is good as a Plea in bar, and protects the Defendant from giving an Answer to a Title set up by the Plaintiff (*n*); but 322*] *a Plea of a bare Title only, without setting forth any

(*f*) Ibid. 221.

(*g*) Ante, 1 vol. 214.

(*h*) Ibid. 210.

(*i*) Claridge v. Hoare, 14 Ves. p. 65. Brownword v. Edwards, 2 Ves. 243.

(*k*) Claridge v. Hoare 14 Ves. p. 59.

(*l*) Brownword v. Edwards, 2 Ves. 246. Redead. Tr. Pl. 159, 3d edit. The Court will take possession of a forged Instrument, and order it to

be deposited with one of its Officers, the Registrar, for instance. Bishop of Winchester, v. Fournier, 2 Ves. 445; and see Ward v. D. of Bucks, 3 Bro. P. C. 581, referred to in Mr. Belt's Supplement, 380.

(*m*) Redead. Tr. Pl. 222. 3d edit.

(*n*) See ante, 1 vol. p. 207. 2 Vent. 361. 2 Atk. 397. Hart v. Middlehurst, 3 Atk. 377. Fitzgerald v. Fauconbridge, Fitzg. 207.

consideration, is ineffectual (o). A voluntary Conveyance, therefore, will not support the Plea (p). This Plea is put in upon Oath (q).

If on a Marriage, and in consideration of that Marriage, an Estate is limited to the Husband in Fee by other Persons who are of the family, and therefore may be considered as making Provision for the Persons claiming under that Settlement, the Husband is to be considered as a Purchaser for a valuable consideration; not with a view to his own enjoyment simply, but because his enjoyment of that Estate is part of the inducement to the Marriage itself. If, for instance, a Father in consideration of the Marriage of his Son were to convey an Estate in Fee to the Son, the Son would be a Purchaser for a valuable consideration, though no consideration had passed to the Father but the Marriage. All Provisions made for the Husband, as well as for the Wife and Issue by a Marriage Settlement, are to be taken as for valuable consideration (r).

A Defendant pleading a Purchase of Lands for a valuable consideration without Notice, must, if the Conveyance purports an immediate Transfer of the Possession (s), aver that the Vendor was seised in Fee, or pretended to be so seised (t), and was in Possession (u); which is satisfied by the Possession of *his [*323 Tenant (x); and that he had no Notice before the Conveyance (y). And the Purchase-money must be actually paid (z), (not merely secured to be paid) (a), for otherwise the Purchaser would not be hurt. The Plea must also state a Conveyance to the Purchaser, for an *Agreement* to convey is insufficient (b). Where the Purchase is of a Reversionary Estate, and, consequently, Possession is not immediately had, the Plea must set out how the Person, from whom the Title was deduced, became entitled (c).

If a Tenant in Tail in Possession under a Marriage Settlement files a Bill for a Discovery, and the Delivery of Title Deeds, the Defendant may plead a Mortgage by the Tenant for Life, alleging himself to be seised in Fee, and in Possession of the Premises and Deeds, as apparent Owner.

(o) *Brereton v. Gamel*, 2 Atk. 241. Reded. Tr. Pl. p. 225.

(p) *Ibid.*

(q) *Marshall v. Frank*, Prec. Ch. 481.

(r) *O'Gorman v. Cemy*, 2 Sch. & Lefr. 148.

(s) 3 P. Wms. 281.

(t) Reded. Tr. Pl. 215. 2d edit. 2 Atk. 630; and see *Head v. Egerton*, 3 P. Wms. 281. Attorney-General v. Backhouse, 17 Ves. 290. S. C. MS.

(u) *Wallwyn v. Lee*, 9 Ves. 32. *Trevannion v. Mosse*, 1 Vern. 246.

(x) *Daniels v. Davison*, 16 Ves. 252. In such Case, however, the Pur-

chaser should set out how the Person from whom the Title is deduced was entitled to the Possession. *Hughes v. Garth*, Amb. 421.

(y) *More v. Mayhow*, 1 Ch. Cas. 34.

(z) *Harwood v. Tooke*, MS.

(a) *Hardingham v. Nicholls*, 3 Atk. 304; and see 3 P. Wms. 307, and *Harrison v. Southcote*, 1 Atk. 538. *Story v. Lord Windsor*, 2 Atk. 630.

(b) *Heap v. Egerton*, 3 P. Wms. 280. Reded. Tr. Pl. p. 223. 3d edit.

(c) *Hughes v. Garth*, 2 Eden, 168. S. C. Amb. 421.

A Purchaser denying Notice, need only set forth the Purchase-deed, and plead his Purchase in bar to the Discovery of the Title Deeds (*d*).

If a Bill states facts, from which Notice of the Plaintiff's Claim is inferred, it is not sufficient merely to plead a Purchase without Notice actual or constructive; but the Defendant must also by a full, clear (*e*), and substantial (*f*) Answer, (not merely as 324*) *to knowledge and belief) (*f*), as well as by Averment in the Plea (*g*), deny the facts from which Notice is inferred (*h*), though he is not compellable to make a further Answer as to all the circumstances of the Case that are to blot and rip up his Title (*i*); and though Notice is not specially denied by the Plea, if the Plaintiff replies, that cures the defect in the Plea (*k*). Though notice is denied, yet if proved by the Plaintiff, it opens the Plea on the hearing of the Cause (*l*).

The Defendant must swear that he had no Notice at or before the execution of the Deed (*m*), though Notice is not charged in the Bill (*n*). Denying Notice without adding "at any time before, &c." is sufficient (*o*). Where, in the Plea, the Purchaser omitted to deny Notice, and the Plaintiff replied to it instead of setting it down for Argument, it was held that if the Defendant proved what he had pleaded, the Bill must be dismissed with Costs (*p*). So, if in an Answer, Notice is not denied, the Plaintiff may except: but if he does not, and the Defendant proves what he has stated in his Answer, that, it seems, is sufficient (*q*).

325*] *A Subpœna served, and a Bill filed, (but not a Subpœna alone) is considered as *lis pendens*, and is Notice to all Persons; for otherwise the Party might alien the Land and baffle Justice (*r*); and this doctrine prevents Purchases of litigated Titles (*s*). But a Decree is not implied Notice to a Purchaser after the Cause is ended, for it is the pendency of the Suit that creates Notice; but where it is only to a Decree to Account, and not such an one as puts a conclusion to the mat-

- (*d*) Ashton v. Ashton, 3 Atk. 302.
 (*e*) 3 Atk. 304, 815. 3 P. Wms. 302.
 145.
 (*f*) 3 Bro. P. C. 373, 4.
 (*g*) Jerrard v. Saunders, 2 Ves. 397.
 jun. 187.
 (*h*) Redesd. Tr. Pl. 241. 3d edit.
 and see p. 223, and Cases there cited.
 See also 3 P. Wms. 244, note (F).
 (*i*) Radford v. Wilson, 3 Atk. 815.
 Jerrard v. Saunders, 2 Ves. jun. 187.
 S. C. 4 Rep. C. C. 322.
 (*j*) Jerrard v. Saunders, 2 Ves. jun. 458.
 Kellsal v. Bennett, 1 Atk. 522;
 and see tit. Answer.
 (*k*) 3 P. Wms. 94, 5. 2 Ball & Bea.
 302.
 (*l*) Redesd. Tr. Pl. 223.
 (*m*) Fitzgerald v. Burke, 2 Atk.
 397.
 (*n*) See note (*f*) to Jones v. Thom-
 as, 3 P. Wms. 243.
 (*o*) Ibid.
 (*p*) Eyre v. Dolphin, 2 Ball & Bea.
 382. Harris v. Ingledew, 3 P. Wms.
 81.
 (*q*) 2 Ball & Bea. 303.
 (*r*) Anon. 1 Vern. 318; and see
 Self v. Madox, 1 Vern. 559.
 (*s*) Hiern v. Mill, 13 Ves. 120.

ters in question, that is still such a Suit as affects People with Notice of what is doing (t).

No Case has gone so far as to say, upon the doctrine of Notice, that where Money is secured upon an Estate, and there is a question depending in this Court upon the right of or about that Money, but no question relative to the Estate upon which it is secured, but is wholly a collateral matter, that a Purchaser of the Estate pending that Suit should be affected with Notice by such implication as the Law creates by the pendency of a Suit. And it is settled, that Notice to an Agent or Counsel, who was employed in the thing by another Person, or in another business, and at another time, is no Notice to his Client who employs him afterwards; and it would be very mischievous if it were, for the man of most practice and greatest eminence would then be the most dangerous to employ (u).

*Notice to an Agent, (even though the Principal is an [*326 Infant) (u), is Notice to the Principal (x); if it were held otherwise it would cause great inconvenience, and Notice would be avoided in every Case by employing Agents (y); but it must be Notice in the same Transaction; Notice to the Agent in a posterior transaction not being considered as Notice to another Principal for whom he is concerned in a subsequent Transaction (z); but Notice will not be presumed merely from the circumstance of Title Deeds laid before a Counsel or Attorney, or any thing that could not be supposed to make an impression on the memory (a).

If an Heir at Law gets into Possession of his Ancestor's Estate soon after his death, but subsequently to a Suit in this Court for establishing the Will of the Ancestor in favour of his Devisees, and the Heir conveys the Estate to a Stranger, and afterwards the Will is established in this Court, the Grantee of the Heir is bound, and the Suit will be looked upon as *lis pendens* (b).

So in the Case of a Mortgagor who comes for a Redemption of a Mortgage, if during such Suit he assigns the Equity of Redemption, and on the final Hearing of the Cause there should be a Decree *against the Mortgagor, the Assignee of the [*327 Redemption will be bound by the Decree (c).

If an Heir at Law in a Suit to establish a Will prevails to set

(t) Worsley v. Earl of Scarborough, 3 Atk. 392. *Sed vid.* Snelling v. Squib, 2 Ch. Cas. 48.

(u) Worsley v. The Earl of Scarborough, 3 Atk. 392; and see Mountford v. Scott, 3 Madd. Rep. 34.

(v) Toulmin v. Steere, 3 Meriv. 222.

(x) Sheldon v. Cox, Amb. 626. Maddox v. Maddox, 1 Ves. 62; and see 2 Vern. 574. 1 Bro. P. C. 244. 2 Bro. P. C. 596.

(y) Sheldon v. Cox, 2 Eden, 223.

(z) Hiern v. Mill, 13 Ves. 121. Hamilton v. Rouse, 2 Sch. & Lefroy, 315. Mountford v. Scott, 3 Madd. Rep. 210; but see Toulmin v. Steere, 3 Meriv. 222. Le Neve v. Le Neve, 1 Atk. 646.

(a) Ashley v. Baillie, 2 Ves. 370.

(b) Garth v. Ward, 2 Atk. 175, S. C. Barn. 450.

(c) Garth v. Ward, 2 Atk. 175. S. C. Barn. 450.

it aside, he is entitled to have the benefit of the Evidence against a Purchaser *pendente lite* (d).

Notice of a dormant Encumbrance to a Party that purchased for another, will affect the real Purchaser (e).

Where a Purchaser cannot make out his Title but through a Deed which leads to a fact, he will be affected with notice of that fact (f).

If, therefore, A. be a Trustee of Stock for Children, and the Stock stands in the name of A., and a Person agrees to sell an Estate to A., and it is found by the Vendor that the Money to be paid for it, is Trust Money, such Notice, it seems, would bind the Vendor and affect the Estate (g). Where the Evidence of Notice is very loose, and there exists only a suspicion of it, Equity will not act upon it (h); and the recital of a Fact in a Deed which might, or might not, according to circumstances, be held in a Court of Equity to amount to a Fraud, would not affect a Purchaser for a valuable consideration denying actual Notice of the Fraud (i).

328*] It has been doubted whether a Purchaser of a *Copyhold must be presumed to have Notice of every thing on the Court Rolls (j): but *Vice-Chancellor Leach*, in a subsequent Case, held, that the Court Rolls are the Title Deeds of Copyholds; and that a Purchaser is affected with Notice of the contents of the Court Rolls as far back as a search is necessary for the security of the Title (k).

Notice of a Lease implies Notice of all the Covenants in it (l).

The Possession of a Tenant is Notice to a Purchaser of the whole actual Interest he may have in the Estate; of a Right to Timber, for instance, on the Estate; although such Right accrued by a Title posterior to that on which his Possession was grounded (m).

A Plea of a Purchaser for a valuable consideration without Notice, will not, it has been said, avail against a prior duly registered Deed; but that whether a *legal* or *equitable* Title be conveyed, the Deed will have priority from its Registration (n); it has, however, been held, in anterior Decisions, that a Registration in Middlesex of an *Equitable* Mortgage is not presump-

(d) *Garth v. Ward*, 2 Atk. 175.

(e) *Merry v. Abney*, 1 Chan. Cas.

38.

(f) *Mertins v. Jolliffe and others*, Amb. 312. *Moore v. Bennett*, 2 Ch. Cas. 246. 2 Anstr. 431, 438.

(g) *Sic dict.* in *Harwood v. Tooke*, April 1804. MS.

(h) *Eyre v. Dolphin*, 2 Ball & Bea. 301.

(i) *Kenney v. Browne*, 3 Ridgw. P. C. 612.

(j) *Hansard v. Hardy*, 18 Ves. 462.

(k) *Pearce v. Newlyn*, 3 Madd. Rep. 181.

(l) *Taylor v. Stibbert*, 2 Ves. jun. 437. *Eyre v. Dolphin*, 2 Ball and Bea. 301.

(m) *Allen v. Anthony*, 1 Meriv. 282.

(n) *Eyre v. Dolphin*, 2 Ball & Bea. 301.

live Notice of itself, to a subsequent *legal* Mortgagee; there must be *actual* Notice (*o*).

A Purchaser with Notice, from one who purchased without *Notice, may plead his Purchase (*p*); but where a Purchaser with Notice aliened to one who had no Notice, though the Court would not affect the Purchaser without Notice, yet it being a Fraud, the Purchaser with Notice was decreed to make satisfaction to the Plaintiff (*q*).

A Purchaser with Notice is bound to the same extent, and in the same manner as his Vendor (*r*). A Plea of a Purchase for a valuable consideration is not good to a Bill for Dower (*s*). How far an Assignment of a Term will secure such a Purchaser, has before been considered (*t*). If a Widow is Defendant to a Suit by a Person claiming under her Husband, to discover her Title to Lands of which she is in Possession as her Jointure, she may plead her Settlement in bar to a Discovery, unless the Plaintiff offers, and is able, to confirm her Jointure; but a Plea of this nature must set forth the Settlement, and the Lands comprised in it, with sufficient certainty (*u*).

A Plea of this nature will also hold to a Bill to perpetuate the testimony of Witnesses (*x*).

*Notice of a Bargain and Sale not enrolled (*y*); of a [*330 Deed not registered (*z*); or of a Judgment, though not docketed (*a*), will affect a Purchaser.

Notice of the contents of a Deed will not be presumed merely from the fact of attesting another Person's execution of it (*b*).

It has often been decided, that a Person, taking a Security, or an Estate, in consideration of a Debt previously existing, is equally a Purchaser for a valuable consideration as upon an advance of Money at the same time. The only distinction is; that in the one case, the advance being made, and the Convey-

(*o*) Morecock v. Dickens, Ambl. 678. Cheval v. Nicholls, Str. 664. See on this subject Bushell v. Bushell, 1 Sch. and Lefr. 92, 103; and see 137, 157. Underwood v. Lord Courtown, 2 Sch. & Lefr. 66.

(*p*) Lowther v. Carleton, For. 187. Prec. Chan. 51. 1 Atk. 571. 2 Atk. 139, 242. 1 Sch. & Lefr. 379. 11 Ves. 478. Redesd. Tr. Pl. 224.

(*q*) For. 188, 9. Mertins v. Jolliffe, Ambl. 312. Harrison v. Forth, Prec. Chan. 51. Brandlyn v. Ord, 1 Atk. 571. Ferrars v. Cherry, 2 Vern. 384. Lowther v. Carleton, Barn. 358. S. C. For. 187. 2 Atk. 139, 242. Sweet v. Southcote, 2 Bro. C. C. 66. 1 Sch. & Lefr. 379.

(*r*) Dunbar v. Tredennick, 2 Ball. & Bea. 319.

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(*s*) Williams v. Lambe, 3 Bro. C. C. 264.

(*t*) Ante, 1 vol. p. 506, &c.

(*u*) Chamberlain v. Knap, 1 Atk. 51. Brandlyn v. Ord, ibid. 572; and see Hart v. Middlehurst, 3 Atk. 377. Fitzgerald v. Fauconbridge, Fitzg. 9, 207, and Echcliffe v. Baldwin, 16 Ves. 267.

(*x*) Bechinall v. Arnold, 1 Vern. 354. Jerrard v. Saunders, 2 Ves. jun. 454.

(*y*) 3 Atk. 651, 2.

(*z*) See ante, 1 vol. p. 327.

(*a*) Davis v. Strathmore, 16 Ves. 419.

(*b*) Reed v. Williams, 5 Taunt. 257.

ance executed, at different periods, Notice must be denied as to both (c).

A Purchase for a valuable consideration *bona fide* paid, has been held a good defence, though the consideration was much less than the real value (d).

A claimant under a *Marriage Settlement* without notice of prior Encumbrances, cannot be compelled to a discovery, but may protect himself by Plea (e).

If a Settlement is made after Marriage, in pursuance of an Agreement before Marriage, the Agreement and the Settlement must be shown (f).

After a Plea to a Bill of *Discovery* is overruled, the same thing cannot be insisted upon by answer (g), as it might, if the Bill were for *Relief* (h).

331*]

* *Answer.*

If no Demurrer or Plea is put in, an Answer must be given : and whatever part of the Bill is not covered by the Demurrer or Plea, must be answered. A Defendant may demur to one part of a Bill, plead to another part, disclaim as to another, and answer to another (i). The Answer must be signed by a Counsel (k), unless it be taken before Commissioners ; and if not so signed, it seems, it would, on Motion, be ordered to be taken off the File (l). Where the Answer had been signed by Counsel, but in the Ingrossment Counsel's signature was omitted, it was held necessary to apply for leave to amend (m). The time which is allowed to a Defendant to answer (n), and the Process of Contempt which issues for want of an Answer (o), has before been stated. A Person arrested as he is going to put in his Answer will be discharged (p).

The *Answer*, whether taken before the Master, or Commissioners, must also be *signed* by the Parties, and *sworn to*, in the presence of the Master or the Commissioners before whom the same is taken (q), unless the Plaintiff consents, on a Motion for that purpose, that the Answer should be taken without Oath 332*] (r). Under special circumstances, and by consent,*

(c) See Arg^o. Ex parte Knott, 11 Ves. 616.

(d) Bullock v. Sadliere, Amb. 764.

(e) Williams v. Lane, Bro. Parl. Cas. 8 vol. p. 201. Tomlin's edition. Finch, 9.

(f) Redesd. Tr. Pl. 225. 3d edit. who cites 1 Vern. 139.

(g) Hoare v. Parker, 1 Cox, 283.

(h) Ibid.

(i) Redesd. Tr. Pl. 254.

(k) Brown v. Bruce, 2 Meriv. p. 1.

(l) Harrison v. Delmont, 1 Price, 108.

(m) Ibid.

(n) Ante, p. 206, &c.

(o) See ante.

(p) Alisbury v. Troughton, 1 Chan. Rep. 92.

(q) Vid. Ord. Curiam, 27th April 1748. See this Order, 2 Atk. 289. Vid. 3 Atk. 439, a case anterior to the order, though subsequently reported.

(r) See ante, p. 280.

the Six Clerk has been directed to receive the Answer to a Bill of Foreclosure, though not signed by the Defendant (s).

If an Answer be prepared for five Persons, and only three appear at the Office to swear it, it may be refused (t).

If the Answer misnames the Plaintiff it is not considered as an Answer, and will be ordered to be taken off the File (u). So, if the Answer purports to be an Answer to the Bill of five Complainants only when there are six, it will be ordered to be taken off the File (x). A Motion by the Defendant to take an Answer off the File, defective in the Title, and to amend and Answer it, will be granted, if consented to (y).

A Peer puts in his Answer upon *honour* (z); but his Answer to Interrogatories, and on examination as a Witness, must be upon Oath (a). A Quaker puts in his Answer upon *Affirmation* (b), and has been allowed to put in his Answer without *Affirmation*, where the Bill appeared to be frivolous (c). A Jew swears to his Answer on the *Pentateush* (d).

A Foreigner may put in an Answer in his own Language, but a sworn *Translation* must also be filed *with it (e). A [*333 Corporation puts in an Answer without Oath, under the Corporation Seal.

An Infant puts in his Answer by his Guardian, as before observed (f), but it is not Evidence against him (g); and before he comes of age he may apply to put in a better Answer, where he might not be able to come at the same evidence when he is of age (h).

A Lunatic, against whom a Commission de *Lunatico inquirendo* has issued, puts in his Answer by his Committee, unless he is interested in the Suit, in which case he must answer by Guardian, as he must also where no Commission of Lunacy has issued (i).

Any Person who from age, infirmity, idiotcy, or the effects of sickness, or by any other means, is rendered incapable of managing his own affairs, may have a Guardian assigned to him for the purpose of putting in his Answer (k).

(s) — v. Lake, 6 Ves. 171.

(t) Harris v. James, 3 Bro. C. C. 399. Cooke v. Westall, 1 Madd. Rep. 265, and the cases there cited. *Sed vid.* Done v. Read, 2 Ves. & Bea. 310.

(u) Griffith v. Wood, 11 Ves. 62.

(x) Cope v. Parry, 1 Madd. Rep. 83.

(y) White v. Godbold, 1 Madd. Rep. 269.

(z) See order Dom. Proc. 1640. At an anterior period the Lord Keeper Egerton would not admit such privilege Toth. 10, 11.

(a) Sir Thomas Meers v. Lord Stourton, 1 P. Wms. 146.

(b) 2 Anstr. 479.

(c) Wood v. Story, 1 P. Wms. 780.

(d) Anon. 1 Vern. 263.

(e) Symonds v. the Countess du Barre, 3 Bro. C. C. 263.

(f) Ante, p. 223.

(g) Wrottesley v. Rendish, 3 P. Wms. 237. Savage v. Carroll, 1 Ball. and Beatty, 653.

(h) Bennet v. Lee, 2 Atk. 488, 532; and Savage v. Carroll, 1 Ball and Beatty, 648. et vid. Richmond v. Taylor, 1 P. Wms. 737.

(i) Turn. and Ven. Pract. 1 vol. 197.

(k) Ibid. ante, p. 280.

If a Bill be filed against Baron and Feme, the Feme must answer, though her Answer will not be evidence against her Husband or herself, unless, perhaps, where she afterwards becomes discovert (*l*).

After a Decree upon a Sequestration for want of an Answer, the Defendant is entitled, as of course, to put in an Answer, upon payment of Costs, without a special application to the Court; for the Decree in such cases is only a conditional Decree, upon the *return of the Sequestration, which must be served upon the Defendant, with a Subpœna to hear Judgment before it can be made absolute, and at any time before the return of the Subpœna, he may, as of course, file his Answer upon payment of Costs (*m*). And even where the Decree has been made absolute a party is permitted to file his Answer upon payment of the Costs of the Decree and the Process, and on such other terms as appear to be essential to the attainment of Justice; unless where the Defendant by lying by has put the Plaintiff in such a situation as that justice cannot be done (*n*).

An Answer usually begins by a reservation to the Defendant of all advantage which may be taken by exception to the Bill; a form, which, probably, was intended to prevent a conclusion that the Defendant, having submitted to answer the Bill, admitted every thing which by his Answer he did not expressly controvert, and especially such matters as he might have objected to by Demurrer or Plea. The Answer to the several matters contained in the Bill, together with such additional matter as may be necessary for the Defendant to show to the Court, either to qualify or add to the case made by the Bill, or to state a new case on his own behalf, next follow, with a general denial of that combination which is usually charged in a Bill (*o*).

The *general Traverse* at the end of an Answer, viz. "*with-335*] out that, that any other matter in the Bill, *contained is true,*" obtained formerly, when the Defendant used only to set forth his Case in the Answer, without answering every clause in the Bill; and where the Bill is fully answered the general Traverse is rather impertinent than otherwise (*p*), though in Practice usually introduced.

In the Case of an Infant, the Answer is expressed to be made by his Guardian; and the general saving at the beginning, together with the denial of combination, and the Traverse at the conclusion, are omitted; for an Infant is entitled to the benefit of every exception which can be taken to a Bill, without expressly making it (*q*).

(*l*) Wrottesley v. Bendish, 3 P. Cases, 341, 2. Odea v. Lord Mountgarret, Vern. & Scriv. 111.

(*m*) See Benson v. Vernon, 4 Bro. (o) Redesd. Tr. Pl. 253, 4, 3d edit.

(*p*) Anon. 2 P. Wms. 87; and see Redesd. Tr. Pl. 249, 2d edit.

(*n*) Foster v. Lynch, 3 Ridg. P. (q) Redes. Tr. Pl. 256.

The Attorney-General may in his discretion put in an Answer, or refuse to answer, nor can Process of Contempt go against him (r). The usual Answer of an Attorney-General is, "that he is a stranger to the matters and things contained in the Bill, and leaves the Plaintiff to make out the best case he can." If, however, the Attorney-General refuses to put in any Answer, the Plaintiff may move that the Court may appoint a short day for him to answer the Bill, or in default thereof that it should be taken *pro confesso* (s). Where the Attorney-General puts in the common Answer he may afterwards move to withdraw it, and put in a new Answer (t), and this, *ex gratia*, is frequently done, to give the Plaintiff a clue to what *will be the case [*336 of the Attorney-General; but no exceptions, it has been held, can be taken to such Answer, or to any Answer of the Attorney-General (u).

A Defendant may, as before observed, *disclaim* all right or title to the matter in demand by the Plaintiff's Bill, or by any part of it. But a disclaimer can scarcely be put in alone; for if the Defendant has been made a party by mistake, having never had an interest in the matter in question, yet, as he might have had an interest which he may have parted with, the Plaintiff may require an Answer sufficient to ascertain whether that is the fact or not; and if in truth it is so, an Answer seems necessary, to enable the Plaintiff to make the proper Party, instead of the Defendant disclaiming (x). So, if Fraud be charged, a disclaimer alone is insufficient; and an Answer must be given to the imputed Fraud (y).

Where the Defendant disclaims, the Court will in general dismiss the Bill against him, unless his conduct has been vexatious (z); but it is said, (a), if the Plaintiff shows a probable cause for exhibiting the Bill, he may, by Motion or Petition, pray a Decree against the Defendant, upon the ground of the Disclaimer (b). Where the Defendant disclaims, unless the Disclaimer be only as to *part*, and an answer to the rest of the Bill, the Plaintiff should not reply (c); if he does he pays the Costs. A Defendant cannot *get rid of a disclaimer, without a [*337 strong case, upon affidavit (d).

If a Party has a right to Relief, he has a right also to an Answer from the Defendant to every Allegation in his Bill, the ad-

(r) *Barclay v. Russell*, Dick. 730.
Davison v. Attorney-General, Exch. 1813.

(s) See the cases mentioned by Mr. Fowler, in his *Exchequer Pract.* p. 452; and see *Barclay v. Russell*, 12 Ves. 729.

(t) *Errington v. Attorney-General*, Bush. 303.

(u) *Davison v. Attorney-General*, Exch. 30 June, 1813.

(x) *Redesd. Tr. Pl.* 253, 2d edit.

(y) *Bulkley v. Dunbar*, 1 Anstr. 37.

(z) *Cooper's Eq. Plead.* 311, and the case there mentioned.

(a) *Harrison's Ch. Pract.* Newland's edit. p. 235.

(b) *Redesd. Tr. Pl.* 254, 2d edit.

(c) *Harrison's Ch. Pract.* Newl. edit. 235. 3 Atk. 582. *Redesd. Tr. Pl.* 235, 2d edit.

(d) *Seton v. Slade*. 7 Ves. 267.

mission of the truth of which, is necessary to entitle him to that Relief (e). The Plaintiff may require this Discovery, either because he cannot prove the facts, or in aid of proof, and to avoid expense (f); or to substantiate the proceedings and make them regular and effectual in a Court of Equity (g).

In a Suit for an Account, the Answer must not merely be such as to enable the Plaintiff to obtain an Account in the Master's Office, but the Defendant is bound to give the best account he can; not, however, by long and oppressive Schedules, but by referring to Books and Accounts so sufficiently as to make them part of the Answer. The Plaintiff has a right to compel him by his Answer to set forth the best Account he can give (h). If, however, a Bill prays that a Defendant may either admit Assets, or that an Account may be taken of the Testator's personal Estate, but does not require the Defendant to set forth such Account, he is not bound to do so; and a submission to Account is sufficient (i).

If in a Suit against an Executor or Administrator, he denies by 338*] his Answer the foundation of the Bill, *viz. That the Plaintiff is not the next of Kin, in which right he sues (g); or denies that there is a Balance of Accounts against the Testator's Estate, he need not set forth an Account of the personal Estate by way of Schedule (h). But if the fact does not lie in his knowledge, though he denies it, he must set out an Account of Assets (i).

So where a Bill was filed for an Account of Goods landed at a certain Quay, the Plaintiff claiming a right of Tollage by prescription, the Defendant denied the Plaintiff's Title, and refused to discover the Goods; and it was held he was not compellable till the Plaintiff had established his right at Law (k).

If a Bill be brought for Tithes of Conies by Custom, and the Defendant by Answer denies the Custom, he need not set forth how many Conies he killed (l).

But although the Defendant by his Answer denies the Title of the Plaintiff, yet in many cases he must make a Discovery, though not material to the Plaintiff's Title, and though the Plaintiff, if he has no Title, can have no benefit from the Discovery. As, if a Bill is filed for Tithes, praying a Discovery of the quantity of Land in the Defendant's possession, and of the

(e) *Cooth v. Jackson*, 6 Ves. 37, 8.

(f) 2 Atk. 241.

(g) 2 Ves. 492, cited Redesd. Tr. Pl. 249. 3d edit.

(h) *White v. Williams*, 3 Ves. 193. *Leonard v. Leonard*, 1 Ball & Beatty, 324; and see Redesd. Tr. Pl. 250, 1.

(i) *Miscnor v. Burfoot*, 1 Cox, 58.

(g) *Sweet v. Young*, Amb. 354.

(h) *Philips v. Carcy*, 4 Ves. 107.

(i) Amb. 354; and see Hard. 188.

Sed quæ. See *Mazzarredo v. Maitland*, 3 Madd. Rep. 170.

(k) *Northleigh v. Lacombe*, Amb. 612.

(l) *Randall v. Head*, Hardr. 188.

value of the Tithes ; though the Defendant insists upon a Modus, or upon an exemption from Tithes, or absolutely denies the Plaintiff's Title, he *must yet Answer as to the quantity [*339 of Land and value of the Tithes (m).

It is broadly laid down in some Books, notwithstanding the preceding Cases, that if a Defendant answers at all he must answer fully ; but this has been a subject of much controversy (n). *Lord Eldon* termed it, "a distracted point (o)." *Lord Kenyon* (p) and *Lord Thurlow* (q), differed on the subject (r) ; but *Lord Rosslyn* observed, that *Cookson v. Ellison* is mistaken ; and that though *Shepherd v. Roberts* was truly reported, yet *Lord Thurlow* afterwards changed his opinion (s).

In one Case, *Lord Commissioner Eyre* said, it had been constantly the practice in the Court of Exchequer, upon arguing exceptions, to admit the question to be discussed, how far the Party was bound to answer the Interrogatories put to him ; but he should be glad to take advantage of the rule that *Lord Thurlow* had laid down in particular cases, and to apply it to all, that wherever the Party is not obliged to answer the Interrogatories put, he must take advantage of it by *Demurrer* (t) ; and in a recent Case (u), *Vice Chancellor Leach* held, that "A Defendant cannot by Answer object to answering,* though by [*340 *Plea* he may. That point was much considered in *Somerville v. Mackay* (x) : It is not expressly decided there ; but I remember during the Argument, the *Lord Chancellor* strongly expressed his opinion that a Defendant could not answer to part of a Bill, and refuse to answer the rest ; and I think that is so useful a Rule that I shall always adhere to it." The inconveniences of a contrary Rule are stated by *Lord Eldon* in *Shaw v. Ching* (y). If a Person is made a Defendant, who has no interest in the subject, and might have been examined as a Witness, he may, as we have seen, by *Plea*, (except in the Case of Corporations) (z) or *Demurrer* (a), as the case may require, insist that he is not obliged to answer ; but if he does answer, he must, in general, answer fully (b) ; but where a Defendant by answering

(m) Redesd. Tr. Pl. 251 ; and see *Gumley v. Fotheroy*, Bunb. 60. Sed. vid. *Jones v. Pawlet*, Gwillim's Tythe Cases, 1100.

(n) See *Dolder v. Lord Huntingfield*, 11 Ves. 293.

(o) *Shaw v. Ching*, 11 Ves. 306.

(p) *Jerrard v. Saunders*, 3 Ves. jun. 254.

(q) *Cookson v. Ellison*, 2 Bro. C. C. 252. *Shepherd v. Roberts*, 3 Bro. C. C. 239.

(r) *Baker v. Mellish*, 11 Ves. 75.

(s) *Jerrard v. Saunders*, 2 Ves.

jun. 457 ; but see *Taylor v. Milner*, 11 Ves. 42.

(t) *Selby v. Selby*, 4 Bro. C. C. 12.

(u) *Mazarredo v. Maitland*, 3 Madd. Rep. 70.

(x) 16 Ves. 382.

(y) 11 Ves. 305.

(z) 3 P. Wms. 810. 3 Bro. 236. 1 Ves. jun. 292.

(a) *Cookson v. Ellison*, 2 Bro. C. C. 252.

(b) See before mentioned Cases ; but see *Newman v. Godfrey*, 2 Bro. C. C. 332, and 1 Anstr. 47.

may subject himself to a *Pain, Penalty, or Forfeiture* (c), in such case, though he might by a Plea or Demurrer shelter himself from answering, yet if he does answer *in part*, he is not compellable to answer *fully*, but by his Answer insist on not answering 341*] such criminal matter (d). And it seems, a *Defendant is not only protected against answering any question that has a direct tendency to criminate him, but any question that forms one step towards it (e). The Law, rather than compel a Man to discover what would subject him to corporal punishment, or disgrace, or force him upon wilful and corrupt Perjury, refers the matter for redress to his own conscience; and therefore the Rule, *nullus recedat a cancellaria sine remedio*, doth not extend to these and the like Cases; but, as a Writer observes, "the offender standeth at the Judgment of God only" (f). In a Case in the Exchequer, where a Defendant was a *Publisher for valuable consideration*, and did not plead that circumstance as he might have done, but insisted upon it in his answer, *Mr. Barron Perrot* held that he should not be obliged to produce his *Title Deeds* (g). So if a Defendant does not plead the Statute of Limitations, yet that Statute, it seems, may be insisted upon in the Answer, and the same advantage derived as if it were pleaded (h). A Solicitor also, may by his answer to a Bill against him and his Clients, refuse to discover any Deeds or Facts confidentially communicated to him (i); but it is questionable, whether the *Executor* of an Attorney can avail himself of the Attorney's privilege not to disclose the concerns of the Client (k).

342*] *If a Plaintiff states himself to be *Heir*, and prays a Discovery, it has been sometimes thought that the Defendant by Answer, denying that the Plaintiff is *Heir*, need not make any further Discovery; and sometimes it has been considered otherwise, as the Defendant may die, and the Discovery be lost (l); nor does this point appear to be clearly settled, unless by the

(c) See Paxton's Case, Select Cases &c. p. 53. *Honeywood v. Selwin*, 2 Atk. 276. *Carzon v. De la Zouch*, 1 Swanst. 192. *Attorney-General v. Brown*, *ibid.* p. 306. As to a Penalty, [*Nelme* and others *v. Newton*, before V. C. Leach, 23 April 1819. MS.]

(d) See Redesd. Tr. Pl. 163, 249. 3d edit. and the Cases there cited. See also *Williams v. Farrington*, 3 Bro. 40. S. C. 2 Cox, 203, and *Wrottesley v. Bendish*, 3 P. Wms. 238, and what Lord Eldon says in *Taylor v. Milner*, 10 Ves. 450, and Lord Manners in *Leonard v. Leonard*, 1 Ball & Bea. 325, 326.

(e) *Paxton v. Douglas*, 10 Ves. 228.

(f) *Grounds and Rudiments of Law and Equity*, p. 7.

(g) Quoted Arg^d. in *Hall v. Noyes*, 3 Bro. 478; and see *Leonard v. Leonard*, 1 Ball & Beatty, 326. *Stevens v. Gaule*, 2 Vern. *Jerrard v. Saunders*, 2 Ves. jun. 454. *Row v. Teed*, 15 Ves. 378.

(h) *Norton v. Turville*, 2 P. Wms. 144.

(i) *Stratford v. Hogan*, 2 Ball & Beatty, 164.

(k) *Fenwick v. Reed*, 1 Meriv. 122.

(l) *Baker v. Mellish*, 11 Ves. 75, 6. That a Defendant may by Answer, insist, that he is not *Heir*, see the Cases mentioned, ante, 1 vol. p. 200.

decision of the *Vice Chancellor* before alluded to. Previous to that decision, the Rule would appear, from the Cases, to be, that a Defendant could not by Answer avail himself of every ground of Defence which he could use by Demurrer or Plea; but that if a Discovery sought for by a Bill was improper, a *Demurrer* or *Plea*, or what is known by the name of a *negative Plea*, might be put in, or a short Answer showing that no further Answer ought to be made; but a Defendant was never allowed by an answer to give a *partial* Discovery, more especially if he did not make a sufficient Averment as a ground of refusing a further Answer (m).

It was held, that if a Partnership be alleged, and an Account prayed, and the Defendant denies the Partnership, he is not bound to set forth an Account (n); but this doctrine appears to be overruled by subsequent Decisions (o).

A Defendant is bound to answer specifically to *the [*343 specific Charges in the Bill; and therefore where a Defendant was charged by the Bill with the Receipt of particular specified Sums, with many circumstances respecting the times *when received*, and of *whom*, and on *what account*, it was held that it was not sufficient for the Defendant to say *generally*, that he had in a Schedule set forth an Account of all sums received by him (p).

The answer, also, must be *argumentative*, but there must be a positive Averment (q).

If the Answer put in be short and delusive, and merely to save an Attachment, and not as a substantial Answer, the Court will not consider it as an Answer, but order it to be taken off the File; and the Court will at once decide upon such an Answer, or if necessary, will refer it to the Master, to see whether the Answer put in be substantially an Answer (r).

If an Answer is insufficient, *Exceptions* may be taken; or rather, it is not considered as an Answer (s). A submission to answer Exceptions is a proof of insufficiency (t). When Exceptions are answered, the whole is taken as one Answer, but not, it seems, so entirely so, as to prevent a Prosecution for Perjury (u).

If an Answer be referred for *impertinence*, no *reference [*344

(m) See *Somerville v. Mackay*, 16 Ves. 392. This Case does not appear to warrant the general proposition stated in the marginal note of the Case. It was decided on the particular nature of the Answer.

(n) See *Jacobs v. Goodman*, 2 Cox, p. 282, mentioned also in note to *Hall v. Noyes*, 3 Bro. C. C. 487.

(o) *Row v. Teed*, 15 Ves. 373; and see *Leonard v. Leonard*, 1 Ball & Beatty, 323.

(p) *Hepburn v. Durand*, 1 Bro. C. C. 503.

(q) *Faulder v. Stuart*, 11 Ves. 303.

(r) *Smith v. Serie*, 14 Ves. 415, overruling *Tomkin v. Lethbridge*, 9 Ves. 178, and 463. *Myres v. Mitford*, M. T. 1819, before Lord Eldon. MS.

(s) *Bishton v. Birch*, 1 Ves. & Bea. 366. *Edwards v. M'Leay*, 2 Ves. & Bea. 258.

(t) 1 Ves. & Bea. 366.

(u) *Edwards v. M'Leay*, 2 Ves. & Bea. 258.

can be obtained for *insufficiency* until the former reference is determined (x).

The Costs of insufficient Answers are thus provided for; for the first insufficient Answer in a town Cause, the Defendant pays 40s.; for a second, 60s.; for a third 4l.; for a fourth, 5l.; and to obtain these Costs the Plaintiff sues out a Subpoena, and if not paid, an Attachment issues (y).

A Demurrer, together with a mere denial of Combination by Answer, does not satisfy the undertaking not to demur alone (z).

Where a Discovery is sought of a Correspondence, if the Defendants set forth *Extracts of Letters*, and swear that those are the only parts of the Correspondence upon the subject, it is sufficient (a).

A Defendant will be held to an offer in his Answer, though the circumstances of the case were varied from what they were at the time the Answer was put in (b).

The doctrine as to Motions for the *Production of Letters or Deeds* referred to in an Answer, will be stated when we treat of Motions after Answer; in which place will also be considered the doctrine as to *scandal or impertinence* in Answers.

When the Defendant has put in his Answer, the Plaintiff determines at his own risk, on what points he shall take *Exceptions*; and if Exceptions *are filed, it is then for the Defendant to consider whether he has sufficiently answered, as to all, or any, and which of those points of the Answer that are excepted to, and may submit to answer all or some, or may argue the question upon the sufficiency of the Answer, first before the Master, and afterwards, on Exceptions to his Report (c).

Exceptions to a Report by a Master, under a Decree made at the Rolls, may be set down before the Lord Chancellor (d).

If an Answer be filed in Term, the Plaintiff must put in his *Exceptions* the same Term, or within eight days after; but if the Answer be filed in the Vacation, the Defendant has eight days after the commencement of the ensuing Term to put in *Exceptions*; and by the consent of the Defendant, or by Motion or Petition, he is, as of course, entitled to two Terms, and the Vacation before the third, within which he may file *Exceptions*, *nunc pro tunc* (e); and after that may have further time upon

(x) Goodinge v. Woodhams, 14 Ves. 534. Lacy v. Hornby, 2 Ves. & Bea. 293. De Castro v. Da Costa, 3 Wood. Lect. 388, in note.

(y) Const v. Ebers, 1 Madd. Rep. 532.

(z) Lee v. Pascoe, 1 Bro. C. C.

78. Lansdown v. Elderton, 8 Ves. 526.

(a) Campbell v. French, Anstr. 58.

(b) Holford v. Burnell, 1 Vern. 448.

(c) 11 Ves. 577, and 190.

(d) Burdon v. Burdon, 9 Ves. 449.

(e) Thomas v. Llewellyn, 6 Ves. 823. Vid. 3 Atk. 19.

special Cause (f); nor is the Rule different in the Case of a mere *Bill of Discovery* (g). And where an Answer has been referred for impertinence, and reported impertinent, the Plaintiff has the two Terms and the following Vacation from the date of the Master's Report of impertinence, within which he may move to file Exceptions to his Answer *nunc pro tunc* (h).

*The Defendant has eight days from the Delivery of [*346 the Exceptions to consider whether he will put in a further Answer (i).

In the *Exchequer*, if the Defendant submits to answer Exceptions, he must give notice to the other Party before he can file his amended Answer; but the practice is different in the Court of Chancery (k).

In general, if a Plaintiff amends his Bill after an Answer is put in, he cannot except to such Answer; but if the Amendment be merely that of adding a Defendant, this does not preclude the Plaintiff from excepting to the Answer (l); and the Amendment of a Bill, after an Answer, by introducing a prayer for an Injunction, has been permitted, without prejudice to Exceptions (m).

Exceptions must be signed by Counsel.

No Exceptions lie to the Answer of an *Infant* (n), nor, as it has been held, to the Answer of the *Attorney-General* (o).

Whilst a Demurrer (p) or a Plea (q) is depending, no Exceptions should be taken to an Answer (r). If Exceptions are taken pending a Demurrer to Discovery, this operates as an admission of the Demurrer; but the Court will permit the Party *to withdraw his Exceptions on the Payment of Costs (s). [*347

Where there is an Answer to part, and a Plea to the residue, the Plaintiff cannot except to the Answer till the Plea is argued, or an Order obtained that it shall stand for an Answer, with liberty to except (t). But if a Plea or Demurrer is filed without any Answer, and is overruled, the Plaintiff need not take Exceptions, but the Defendant must answer the whole Bill as if no Defence had been made to it (u).

(f) Anon. 3 Atk. 19. Goodinge v. Woodhams 14 Ves. 536.

(g) See Baring v. Prinsep, 1 Madd. Rep. 526, which overrules Hewart v. Semple, 5 Ves. 86.

(h) Dyer v. Dyer, 1 Meriv. 1.

(i) Harrison's Ch. Pract. Newl. Edit. p. 197.

(k) Anon. 1 Anstr. 86.

(l) Taylor v. Wrench, 9 Ves. 315.

(m) Savory v. Dyer, Ambl. 70. Jacob v. Hall, 12 Ves. 458; and see De la Torre v. Bernaldes, 4 Madd. Reports.

(n) See 1 Ves. jun. 494. 4 Bro. C.

C. 256. Lucas v. Lucas, 13 Ves. 27. S. C. MS.

(o) Davison v. Attorney-General, Exch. 30 June, 1813.

(p) London Assurance v. East India Company, 3 P. Wms. 326.

(q) Copeland v. Wheeler, 4 Bro. C. C. 256.

(r) Baker v. Pritchard, 2 Atk. 390.

(s) Boyd v. Mills, 13 Ves. 85. Redd. Tr. Pl. p. 232. 2d edit.

(t) Darnel v. Reyny, 1 Vern. 244, and 2 Atk. 390; but see 3 P. Wms. 337, note 8.

(u) Bunbury, 123, cit. Redd. Tr. Pl. 256. 3d edit.

If Exceptions are taken to an insufficient Answer, and the Defendant insufficiently answers the Exceptions, the Answer must then be referred back upon the *old* Exceptions (x), for the Plaintiff cannot add to the Exceptions (y).

Where an original Bill has been filed, and Exceptions have been taken to the Answer, and the Plaintiff moves to amend, if he thinks that the Answer to the original and amended Bill, as insufficient, he must go before the Master upon the old Exceptions, as they apply to the original Bill, and upon new Exceptions, as to the new matter introduced by the Amendments; and the utmost he can have is the Master's Judgment upon the Answer to the Amendments, with reference to such parts of the original Bill as apply to them. If the original words apply to 348*] the amendments, the Master, considering whether the *Answer is sufficient as to the Amendments, must take into his consideration every thing in the amended Bill that gives a construction to the Amendments (z).

If an Answer is put in, and upon Exceptions it is reported insufficient, the Defendant it has been held, may still insist on the same matter by his second Answer (a); and if on Exceptions to such second Answer it is again reported insufficient, the Defendant may except to such Report; and bring the matter before the Court; for where there are several Exceptions, as the matter has not undergone the Judgment of the Court, they may go into it; though, says *Lord Hardwicke*, "If it was a single Exception, perhaps, it would be another matter (b)." But this doctrine, it seems, is not now altogether tenable. Formerly, it was usual, when *one* Exception to an Answer was allowed by the Master, he reported the Answer insufficient, generally, without entering into the consideration of the remaining Exceptions; but it is now determined that the Master's Judgment must be given on each Exception (c).

Where Exceptions were taken to an Answer, and the Answer was reported insufficient, and the Plaintiff amended his Bill, and 349*] took a great many Exceptions* to the Answer to the amended Bill, the Chancellor, on Motion, referred the second set of Exceptions to the same Master (d).

When Exceptions are in the Paper for Argument, and the Plaintiff does not appear, if the Defendant produces an Affid-

(x) *Partridge v. Haycraft*, 11 Ves. 575.

(y) *Ibid.* 575, 580.

(z) *Partridge v. Haycraft*, 11 Ves. 581.

(a) *Finch v. Finch*, 2 Ves. 491.

(b) *Ibid.*

(c) *Rowe v. Gudgeon*, 1 Ves. & Bea. 333. In the Exchequer, Exceptions are in the first instance, and without any reference, argued in open Court; and it was formerly the

practice of that Court, when the Answer on Argument was found defective on one of the Exceptions, to desist from further Inquiry respecting the remaining Exceptions which were taken as allowed; but now all the Exceptions must be argued, and allowed or disallowed. [See 6 Bro. P. C. 506, n.]

(d) *Pratt v. Tessier*, 1 Bro. C. C. 39.

vit of Service of the Order upon him for Argument of the Exceptions, they will be overruled ; but if no such Affidavit is produced they are only struck out of the Paper (e). So if the Defendant does not appear, and the usual Affidavit is produced, the Exceptions will be allowed. The Affidavit in these cases must be produced in Court ; it is not sufficient to produce it to the Register out of Court (f).

Replications and Rejoinders.

A REPLICATION is the Plaintiff's Answer, or Reply to the Defendant's Plea, or Answer (g).

Where the Defendant by his Answer admits the Plaintiff's Case, or so much as to render the examination of Witnesses unnecessary, a Replication need not be filed (h), unless, perhaps, in the case of an Infant, who, as his Answer cannot be read against him, can admit nothing, and the Plaintiff, therefore, must prove his Case (i). In a late Case, *Lord Eldon* observes, "it is said, that in the Case of an **Infant Plaintiff* there must [*350 be a Replication, but I cannot find that laid down in any Book of Practice" (k).

Special Replications were formerly put in, but they are now disused (l).

Rejoinders are also disused, but the Plaintiff after replication must serve the Defendant with a Subpœna, requiring him to appear to rejoin, unless he will appear gratis (m). The effect of this Process is merely to put the Cause completely at issue between the Parties ; for immediately after the Defendant has appeared to rejoin gratis, or after the return of a Subpœna to rejoin, served on the Defendant, and which by Order, obtained of course, is now usually made returnable immediately, and served on the Defendant's Clerk in Court, the Parties may proceed to the examination of Witnesses to support the facts alleged by the Pleadings. Where by mistake a Replication has not been filed, and yet Witnesses have been examined, the Court has permitted the Replication to be filed *nunc pro tunc* (n).

(g) Anon. 18 Jan. 1818, before V. C. Leach.

(f) Anon. 4 Feb. 1818, before V. C. Leach.

(g) Redesd. Tr. Pl. 255. 2d edit.

(h) Pract. Reg. Wyatt's edit. p. 374. *Barker v. Wyld*, 1 Vern. 140.

(i) *Legard v. Sheffield*, 2 Atk. 377 ; and see 2 Eq. Abr. p. 227, in *Marg. Sed. v. contra Thurston v. Nutton*, mentioned in note A. to 3 P. Wms.

237 ; and see on this subject *Bacon's Tracts*, 291.

(k) *Cowdell v. Tatlock*, 3 Ves. & Bea. 20, 21. In 1 Turn. & Ven. Pract. p. 84 4th edit. it is said that a Replication is always necessary where the Plaintiffs, or any of them, are Infants.

(l) *Noseworthy v. Bassett*, 1 Vern. 351. Redesd. Tr. Pl. 256.

(m) *Mosely*, 123, 296.

(n) *Ibid.* 296.

Where there is a Plea and Answer, and the Plaintiff replies, the Replication must be to the Answer and also to the Plea (o).

A Plaintiff may after Replication obtain an Order of course to withdraw his Replication, and amend the Bill (p); but the Court will not give leave to *withdraw a Replication*, unless for 351*] the purpose of amending* the Bill (q); and in such case the Plaintiff must not only show the materiality of the Amendment, but also why the matter to be introduced by the Amendment was not stated before (r).

Sometimes liberty to amend is given without withdrawing the Replication (s).

An Order to withdraw a Rejoinder, and rejoin *de novo*, may be obtained for the purpose of giving notice of an intention to dispute an Act of Bankruptcy under the Stat. 49 Geo. 3. c. 121, by analogy to the practice at Law, permitting a Plea to be withdrawn; but there must be an Affidavit, as is the practice in the Exchequer, stating the Deponent's information and belief, that it is essential to the justice of the Case (t). The liberty, however, given by the Order being an indulgence, will not be extended to a Case where the negligence of the Party obtaining it has put it out of the power of the other Party to establish the fact it was intended to dispute; and therefore, where such an Order had been obtained, and it afterwards appeared that the Person who proved the Act of Bankruptcy was dead, the Order was directed to stand only upon the terms of the Defendant consenting that the Depositions of the deceased should be admitted as Evidence of the Act of Bankruptcy (u).

A further Answer is in every respect similar to, and indeed 352*] is considered as forming part of, the first *Answer. So an Answer to an amended Bill is considered as part of the Answer to the original Bill (x).

A Plaintiff may either have a Decree according to his Equity, or the Defendant's offer in his Answer, although he replies to it, and goes to Commission (y).

Motions after Demurrer, Plea, or Answer, and before Decree.

THE general doctrine as to Motions has before been observed upon (z). Those most commonly resorted to in this stage of a Suit, are,

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| (o) Niccol v. Wiseman, 2 Vern. 221; and see 2 Rose, 216. Coop. 46. | (u) Brickwood v. Miller, 1 Meriv. 270. |
| (p) Rogers v. Gore, 17 Ves. 130. | (x) 3 Atk. 303. |
| (q) Pott v. Reynolds, 3 Atk. 565. | (y) Anon. Mos. 41; and see 1 Vern. 448. |
| (r) Longman v. Calliford, 3 Anstr. 807. | (z) Ante, p. 211, &c. |
| (s) Andree v. ——— 2 Dick. 768. | |
| (t) Berks v. Wigan, 1 Ves. & Bea. | |

1. *Motion to receive an Injunction.*

If an Injunction obtained before Answer is dissolved on the Answer, the Plaintiff may amend his Bill; and if the Defendant is in default by not having answered such amended Bill, the Plaintiff may by *special Motion*, on an Affidavit, verifying the truth of the Equity stated in the amended Bill, obtain an Order to revive the Injunction (a).

2. *Motion to refer for Scandal or Impertinence.*

It may be generally observed, that there can be no one Proceeding before the Court, which, if made the vehicle of scandal and Impertinence, the Court will not examine with the view to reform it (b).

In these cases the Court always shows an anxiety *to [*353 keep the Record pure; and the Court, it seems, even without a Motion, and on the application of a Person not a Party to the Record, would interfere (c).

If an Answer contains any thing scandalous, the Court will, on a Motion of course, refer it to the Master, and it will be expunged. The Court sends it to the Master immediately, from the impossibility of the Court to inquire, itself, in the first instance, and from considerations of delicacy as to character (d).

If an answer goes out of the Bill to state some matter not material to the Defendant's Case, it will be deemed impertinent (e); but if the matter of an Answer be *relevant*, whatever be the nature of it, it is not *scandalous* (f); and nothing is considered as irrelevant that may have an influence upon the Suit, attending to the nature of it (g).

A Defendant may obtain a Reference for Scandal contained in the Answer of a Co-defendant (h).

Though the Answer be referred for insufficiency, it may afterwards be referred for scandal (i).

If an Answer is referred for scandal, and reported scandalous, and the Scandal is expunged from the Record, the Party cannot afterwards except to the Report, because it does not appear on the Record what the Scandal was, the Parties being faulty in not excepting sooner (k).

(a) James v. Downes, 18 Ves. 552.

(b) Erskine v. Garthshore, 18 Ves. 114. In this Case it was held that a *State of Facts* before the Master containing Scandal and Impertinence may be referred.

(c) Coffin v. Cooper, 6 Ves. 514.

(d) Ibid. 515. Ante. 276.

(e) Redead. T. Pl. 253. 3d edit.

(f) Mosely, 45, 70. 6 Ves. 514.

(g) Lord St. John v. Lady St. John, 11 Ves. 539. Coffin v. Cooper, 6 Ves. 514.

(h) Coffin v. Cooper, 6 Ves. 514.

(i) Ellison v. Burgess, mentioned in note to 2 P. Wms. 312.

(k) Harrison's Pract. edit. Newland, p. 193, who cites 2 P. Wms. 181.

354*] *So if an Answer contain *impertinence*, a Motion may be made to refer it, so that it may be expunged.

It has been said there is no established Rule of the Court within what time an Answer may be referred for *impertinence* (*k*); but after the answer has been replied to (*l*), or after the Plaintiff has undertaken to speed the cause, it cannot, it seems, be referred for *impertinence* (*m*). *Impertinence*, however, has in some cases been ordered to be expunged, even at the hearing of the Cause (*n*).

If an Answer be considered *impertinent*, and also *insufficient*, an application should first be made to refer the Answer for *impertinence*, and a Report should be obtained before the Motion to refer for *insufficiency* (*o*); for one Master may consider that as *impertinent*, which another Master might think *necessary*, and which supplied the deficiency (*p*); and it has been held, that after a reference for *insufficiency*, the Answer cannot be referred for *impertinence* (*q*); or if already referred for *insufficiency*, such reference is waved by a reference for *insufficiency* (*r*).

A Schedule to an answer containing a Bill of Costs at length, and observations with reference to a Bill formerly delivered for the same business, was considered as *impertinent*, though the 355*] Bill called *upon the Defendant to set forth how he computed and made out his demand, with all the particulars relating thereto, with Interrogatories pointed to the particular *items*, and to a minute comparison of the two Bills. The Defendant ought to have *referred* to the former Bill of Costs (*s*).

If, in an Answer to an *amended* Bill, the Defendant puts in a complete Answer over again, instead of referring to his former Answer it may be referred for *impertinence* (*t*); and if upon such reference such parts of the Answer are reported to be *impertinent*, they will be struck out as such, with Costs (*u*).

There is great difficulty sometimes in saying what is *impertinent*.

If an instrument is required to be set forth by the Bill, it is not *impertinent* to set forth the whole of it, for if a Defendant takes upon himself to state only the substantial part of the Instrument, and an exception is taken because he has not set forth

(*k*) *Kinworthy v. Allen*, 1 Bro. C. C. 440. overruling what is said 2 Ves. 631.

(*l*) *Dixon v. Olmius*, 1 Cox, 412.

(*m*) See *Barnes v. Saxby*, cited in Mr. Newland's edit. of *Harrison's Ch. Pract.* 192.

(*n*) *Anon.* 2 Eq. Ca. Abr. 68.

(*o*) *Goodinge v. Woodhams*, 14 Ves. 534. *Lacy v. Hornby*, 2 Ves. & Bea. 293.

(*p*) *Thomas v. —*, 14 Ves. 537, in note.

(*q*) *Pellew v. —*, 6 Ves. 458.

(*r*) *Ibid.* 456.

(*s*) *Alsager v. Johnson*, 4 Ves. 217; and see *Norway v. Rowe*, 1 Meriv. 347, and *French v. Jacks*, *ibid.* p. 357, in note.

(*t*) *Sic dict.* *Hildyard v. Cressy*, 3 Atk. 303.

(*u*) *Redesd. Tr. Pl.* 253. 2d edit.

the substantial part, the Court would be unable to decide what was the substantial part (x).

A Defendant is not bound to confine himself to Answer to the Interrogatories in the Bill, but may state circumstances in his Defence. If what is stated is immaterial, it would be impertinent (y).

If the Plaintiff refers the Answer for scandal or impertinence, and the Master finds the Answer is *neither scandalous [*356 or impertinent, the Plaintiff, in his Exceptions to the Master's Report, must show wherein, in what line or page, and how far the matter is scandalous or impertinent, so that such part of the Answer may be expunged by the Master; and it is not sufficient to say, generally, that the Answer is scandalous or impertinent (y); but nothing is said of the converse of the proposition—as to the form of the Exceptions where the Answer is found to be impertinent. In a recent Case, however, it was determined, that Exceptions to a Report of Impertinence may be taken after an Order to expunge, until that Order has been acted upon, and that it is not necessary to take objections before the Master previous to a Report of Impertinence; and further, that where it was impossible to prepare Exceptions, so as to specify the matter of the Exceptions before the matter would be expunged by the Master, a *general Exception* was allowed to be taken to the Master's Report, without setting out the particulars excepted to (z).

If an Examination is referred for impertinence, and the Master finds it impertinent, he should state in his Report, in what respects he considers the same as impertinent (a).

When an Answer is referred for impertinence, nothing can be done in the Cause till that reference is disposed of; and where, therefore, on the coming in of the Answer, an Order nisi had been obtained *to dissolve an Injunction, and then the [*357 Plaintiff moved to refer the Answer for impertinence, it was held that the Defendant could not move to make the Order absolute for dissolving the Injunction, until the reference for impertinence was disposed of (b).

A Motion to refer Interrogatories and Depositions (c), or the latter alone, for Impertinence and Scandal, may be made as of course, without Notice (d); but no reference in such Cases will be made for impertinence only, there must be also Scandal (e); the Deponent, however, will not be ordered to pay the Costs of

(x) *Clissold v. Powell*, 24 Feb. 1818, before V. C. Leach.

(y) *Anon.* 25 Feb. 1818, before V. C. Leach.

(z) *Craven v. Wight*, 2 P. Wms. 182.

(a) *Norway v. Rowe*, 1 Meriv. 135.

(a) *Anon.* 3 Madd. Rep. 246.

(b) *Jennings v. Walker*, 1 Cox, 178.

(c) *White v. Fussell*, 19 Ves. 113.

(d) *Eastham v. Liddell*, 12 Ves.

201. *Irish v. Rooke*, mentioned in *Price v. Shaw*, 3 Dick. 733.

(e) *Ibid.* *Contra Vaughan v. Lloyd*, 1 Cox, 314.

scandalous or impertinent Depositions, since it was the Commissioner's fault to take down such Deposition (*f*).

If an Answer, on Reference, is reported impertinent, it is a Motion of course to move for a Reference to tax the Plaintiff's Costs, but if reported not impertinent, a like Motion may be made to refer it to the Master to tax the Defendant's Costs (*g*).

By a *General Order*, 10th March 1818 (*h*), all References of Answers for insufficiency, or for Scandal and Impertinence, or for Impertinence, made in the same Cause, must be made to the same *Master*; and where Answers of Defendants have been re-358*] ferred *for Scandal and Impertinence, or for Impertinence, and the Court shall afterwards refer the same for insufficiency, the latter Reference is to be made to the same *Master* as on the former Reference.

2. Motion that Plaintiff may elect to sue at Law, or in Equity.

It is a Rule, that *after* an Answer has been put in, and the Plaintiff proceeds at Law, the Defendant may, by a Motion of course (*i*), require him to *elect* in which Court he will sue (*k*); but *before* Answer the Plaintiff cannot be put to his election (*l*); nor after an Answer, before the common time for filing Exceptions is expired; nor if the Answer is excepted to, until the Exceptions are answered, for the Plaintiff is entitled to a complete Answer before he can be put to an election (*m*).

After the Order to make an election is served on the Plaintiff's Clerk in Court, he has eight days to show cause against making his election; if he elects to proceed at Law, his Bill in Equity will stand dismissed with Costs. - If he elects to proceed in Equity, an Injunction issues to stay his proceedings at Law (*n*).

A Party may move to discharge an Order putting him to his 359*] election, and insist that it was obtained *upon a false allegation, that the Suits are for the same matter; and if upon such Motion it appears they are not for the same matter, the Court does not refer it to the Master; but if the Court has any difficulty in determining whether they are for the same matter or not, then a Reference is directed, and all proceedings are stayed in both Courts in the mean time (*o*).

(*f*) Anon. 2 P. Wms. 405; and see *Cocks v. Worthington*, 2 Atk. 235.

(*g*) *Tyrell v. Redifer*, 1 Meriv. 132. *Whitehear v. Hughes*, 2 Dick. 154.

(*h*) 3 Madd. Rep. 317.

(*i*) Anon. 1 Ves. jun. 91. *Garish v. Donovan*, 2 Atk. 166. *Mills v. Fry*, 3 Ves. & Bea. 9. Anon. before V. C. Leach, 19 May 1819. MB.

(*k*) *Mocher v. Reed*, 1 Ball & Bea. 319; and see *Jones v. Lord Stafford*,

3 P. Wms. 90. Anon. 1 Ves. jun. 91, cited in note to *Redead. Tr. Pl. 200*.

(*l*) *Jones v. Earl of Stafford*, 3 P. Wms. 90. *Tillotson, v. Ganson*, 1 Vern. 103.

(*m*) *Brown v. Poyntz*, 3 Madd. Rep. 241.

(*n*) *Harrison's Ch. Pract. Newl.* edit. 316.

(*o*) *Mills v. Fry*, 3 Ves. & Bea. 9. Anon. 2 Madd. Rep. 395, overruling *Boyd v. Heinzelman*, 1 Ves. & Bea. 381.

If, during the pendency of an Order to elect, the Defendant proceeds in Equity, he is not, it seems, entitled to the benefit of the Order to elect (p).

A dismissal of a Bill upon an Election to proceed at Law is not peremptory; and if the Plaintiff fails at Law he may file a new Bill (q).

It has been said to have been held, that where a Man is put to his election whether to proceed at Law or in Equity, if the Bill be for Land, and to have an Account of the meane Profits, he may elect to proceed in an Ejectment at Law for the Possession, and in Equity upon the Account; because at Law he can recover Damages for mesne Profits from the time only of the entry laid in the Declaration (r); but this seems laid down too generally; for if a Man brings an Ejectment Bill for Possession, and an Account of Rents and Profits where there is no mixture of Equity, the Court will oblige the Plaintiff to make his election to proceed in Equity or at Law, and if at Law, he must proceed for the whole there; unless, perhaps, in the instance of a *Bill by an Infant, in which case the Court might elect [*360 for him to proceed at Law, and retain the Bill for the mesne Profits (t).

But though it is a general Rule that when a Party is suing in Equity he shall not be allowed to sue at Law for the same thing, yet the case of a Mortgagee forms an exception, he having a right to proceed at Equity and at Law at the same time (u); nor will the Court stop the Proceedings at Law unless the Defendant brings in the Money (x).

If the Plaintiff strikes out of his Bill the Prayer for Relief, and confines the Bill to a Discovery only, he will not be put to his election (y).

And where the Representative of an intestate is seeking to give a preference, by confessing Judgments, the Court will give the Plaintiff leave to proceed at Law to recover Judgment, with a *Cesset Executio*, and yet suffer him to proceed in Equity for a Discovery and Account of Assets (z).

If after a Decree to Account the Plaintiff proceeds at Law against the Defendant, a Motion that he may elect is unnecessary, as a Motion may be made for an Injunction to restrain proceedings in the Action (a).

(p) Mills v Fry, Coop. 108. (x) Rees v. Parkinson, 2 Anstr. 497.
 (q) Countess of Plymouth v. Bladon, 2 Vern. 32. (y) Fitzgerald v. Succomb, 2 Atk. 85.
 (r) Anon. 1 Vern. 105. (z) Barker v. Dumaresque, 2 Atk. 119. S. C. Barn. 277.
 (t) See Dormer v. Fortescue, 3 Atk. 129. (a) Wilson v. Wetherhead, Meriv. Lefr. 176. Burnell v. Martin, 2 Douglt. 417.

3. *Motion on a Bill for specific Performance, for a Reference as to Title, &c.*

AFTER an Answer submitting to perform a Contract for a 361*] Purchase if a good Title can be made, a *Reference to the Master will, on Motion, be directed, to inquire whether a good Title can be made, and whether it appears upon the Abstract that a good Title could be made (b); but if a Reference is had as to Title on one Motion, another Motion cannot be made, before the Master's Report, as to the Abstract, nor after the Master's Report, without a special Case (c). These References are limited to Cases where the Title only is disputed (d); and therefore where the question between the Parties was, whether upon a Contract for the Sale of a Lease the Vendor must be considered as having undertaken to produce the Lessor's Title (e); and where the Defendant objected to the Title, and claimed a compensation for a deficiency in the quantity of the Land sold (f), the Order, it was held, could not be made. If the Answer, upon reasons *solid* or *frivolous*, insists the Agreement ought not to be executed, there, unless the objection is removed by consent, no Reference will be made (g).

If a Reference has been made as to the Title only, and the Master reports a good Title can be made, an Order may be obtained referring it back to the Master to see whether such Title could have been made prior to the filing of the Bill by the Vendor for a specific performance (h).

362*] Upon a Bill for an Account, it was held that the Defendant could not, upon Motion, immediately after the putting in of the Answer have a Reference to the Master to take the Account (g).

4. *Motion for Payment of Deposit into Court.*

ON large Purchases it is always prudent, for the sake of Security, and to obtain Interest on a Deposit, to move that it may be paid into Court, in Cases, where, on a Bill for the specific performance of a Purchase Agreement, the Title is disputed (h). All the risk respecting the Deposit rests with the Vendor; for though the Auctioneer is, to a certain degree, a Stakeholder for

(b) Wright v. Bond, 11 Ves. 39. 19; and see — v. Skelton, 1 Ves. Jennings v. Hopton, 1 Madd. Rep. 211. & Bea. 516.

(c) Hyde v. Wroughton, 3 Madd. Rep. 279, followed in subsequent Cases before the Vice Chancellor. (g) Blyth v. Elmhirst, 1 Ves. & Bea. 3; and see Balmanns v. Lumbly, ibid. 224. Paton v. Rogers, ibid. 352.

(d) Morgan v. Shaw, 2 Meriv. 140. (h) Birch v. Haynes, 2 Meriv. 444. Jennings v. Hopton, 1 Madd. Rep. 212. Ante, p. 257. (g) Eldridge v. Porter, 14 Ves. 139.

(e) Gompertz v. —, 12 Ves. 17. (h) Annesley v. Muggridge, 1 Madd. Rep. 596.

(f) Lowe v. Manners, 1 Meriv.

Vendor and Vendee, yet so far as respects any risk as to the Deposit the Auctioneer is considered as the Agent only of the Vendor (i). But in these Cases the Auctioneer is entitled to deduct out of the Deposit his Costs and Expenses (k).

5. *Motion to dissolve Injunction.*

WHERE an Injunction has been obtained on Affidavit, until Answer or further Order, the Defendant may, before Answer, move to dissolve it upon an Affidavit in reply to that upon which the Injunction was obtained (l). Where this course is not pursued, but the Defendant puts in an Answer, it is a Motion of course, for an Order *nisi* to dissolve the Injunction (m);* and such Order will be made, unless the Plaintiff, *363 on a day mentioned in the Order, shows good cause to the contrary. If on that day no cause is shown, the Injunction is then, on Motion, dissolved; but if some only of the Defendants have answered, the Injunction will be dissolved only as to those who have answered (n). On a Motion to make an Order *nisi* to dissolve an Injunction, absolute, at the last Seal after Trinity Term, the Plaintiff cannot have time till the next day of Motions, upon the usual undertaking to show cause on the merits, as that would, in effect, be continuing the Injunction to the Seal before Michaelmas Term; but in such case the Court permitted cause to be shown during the Petitions (o).

If an Answer is put in and *replied to*, it is too late, it seems, for the Defendant to move to dissolve the Injunction upon the Answer (p).

The Plaintiff may show, for cause against dissolving the Injunction, either that he has obtained a Reference of the Answer for impertinence (q), or that he *has filed (r), or will immediately undertake to file (s) Exceptions to the Answer, or merits confessed by the Answer, sufficient to entitle the Plain-

(i) Ibid. and see *Smith v. Jackson*, 1 Madd. Rep. 596.

(k) 1 Madd. Rep. 596.

(l) *Vipon v. Mortlocke*, 2 Meriv. 478.

(m) In *Strathmore v. Bowes*, 1 Cox, 163, it was held, that where an Injunction to stay Waste had been obtained on a Bill filed and Affidavit, the Defendant might immediately on the coming in of the Answer move to dissolve the Injunction without obtaining any Order *nisi*, but then his Answer can only be received as an Affidavit, and the Plaintiff may read Affidavits in contradiction to it; and if after, upon Exceptions, the Answer appears insufficient, the Injunction will be revived. *Sed quæ.*

(n) *Joseph v. Doubleday*, 1 Ves. & Bea. 497. *White v. Steinwack*, 19 Ves 83.

(o) *Robinson v. Wardell*, 5 Ves. 552. This Case is wrongly reported. It is corrected to the effect above stated, in *Rew v. Dixon*, 2 Madd. Rep. p. 254.

(p) *Burridge v. Payne*, 26 March 1808 MS *Sed vid. contra Molineux v. Luard*, 2 Dick. 684.

(q) *Fisher v. Bailey*, 12 Ves. 18. *Goodinge v. Woodhams*, 14 Ves. 534. *Raphael v. Birdwood*, 1 Swanst. 229, 230, 231.

(r) *Goodinge v. Woodhams*, 14 Ves. 536.

(s) *Vipon v. Mortlock*, 2 Meriv. 479.

tiff to the continuance of the Injunction (*t*). If the Answer be referred for, and reported impertinent, the Plaintiff may afterwards except for insufficiency, but it seems such Exceptions must be taken immediately, and the Plaintiff cannot defer them till the impertinence is expunged, for otherwise great delay might occur, as the Plaintiff alone can move to expunge the impertinence (*u*). If Exceptions are shown as cause, the Plaintiff will be compelled to obtain the Master's Report on his Exceptions within four days (*x*), or the Injunction will be dissolved. When the Master's Report cannot be conveniently obtained within the four days, it is usual for the Parties to consent to an enlargement of the time (*y*): or an application may be made to the Court to enlarge the time, on a Certificate of the Master that he is unable to make his Report within four days; but without such consent, or Order of Court, if the Report is not obtained within the four days, the Injunction will, without any further Motion, be dissolved, and the Party may proceed as if no such Injunction had ever been obtained (*z*); but on obtaining the Master's Report, the Plaintiff may move on the merits 365*] to *revive the Injunction (*a*). If the Master reports the Answer sufficient, the Injunction becomes dissolved without any further Motion (*b*), though that is different in the *Exchequer* (*c*); nor does the Plaintiff, by taking Exceptions to such Report, prevent the dissolving of the Injunction (*d*); for though the original Exceptions still continue in Court, and the Court is to decide upon them, yet, as to the Injunction, the Master's Report is decisive (*e*); but if afterwards the Court is of opinion the Answer is insufficient, the Party may move to revive the Injunction (*f*). So if the common Injunction be extended to stay Trial, and the original Injunction falls, the extension of the Injunction to stay Trial, falls also, without a Motion to dissolve it, there being no instance of a Motion to dissolve an Injunction to stay Trial (*g*). If the Master Reports the Answer insufficient, the Injunction will be continued till the Exceptions are answered, which being done, the Defendant must move again to dis-

(*t*) *Turner v. Bazeley*, 2 Ves. & Bea. 33.

(*u*) See *Raphael v. Birdwood*, 1 Swanst. 228.

(*x*) *Botham v. Clarke*, 2 Cox. 423; but see 1 Ves. & Bea. 505.

(*y*) See *Bishton v. Birch*, 2 Ves. & Bea. 42.

(*z*) *King v. —*, 1809, MS.

(*a*) *Owen v. Lyon*, 28 Feb. 1798. *Noel v. King*, 26 April 1819, before V. C. Leach. MS.

(*b*) *Bishton v. Birch*, 2 Ves. & Bea. 42. *Hutchinson v. Markham*, 2 Madd. Rep. 335. *Vipan v. Mortlock*, 2 Meriv. 479. *Sic dict.* *Raphael v. Bird-*

wood, 1 Swanst. 231. *Botham v. Clarke*, 2 Cox. 428. *Adney v. Flood*, 1 Madd. Rep. 449. *Dipper v. Darant*, 3 Meriv. 465; and see *Lacey v. Hornby*, 2 Ves. & Bea. 291.

(*c*) — *v. Dubarry*, 1 Anstr. 255.

(*d*) *Vipan v. Mortlock*, 2 Meriv. 479. *Birch v. Beach*, 2 Ves. & Bea. 42.

(*e*) *Corson v. Stirling*, Coop. 94. *Raphael v. Birdwood*, 1 Swanst. 230. *Botham v. Clarke*, 2 Cox. 423.

(*f*) 2 Cox. 429.

(*g*) *Bishton v. Birch*, 2 Ves. & Bea. 40.

solve the Injunction, and the same cause may again be shown by the Plaintiff for its continuance (h).

If the Master reports the Answer insufficient, and *the [*366 Report is excepted to, and the exception is argued before the Master of the Rolls, and allowed, the Injunction is immediately dissolved without further Motion; nor can it be revived on the ground of an appeal from his Decision (i).

If the Answer denies all the circumstances upon which the Equity is founded, the universal practice, as to the purpose of dissolving or continuing the Injunction, is to give credit to the Answer, and that is carried so far, that (unless in a few excepted Cases) though five hundred Affidavits were filed, not only by the Plaintiff, but by as many Witnesses, not one could be read to prevent dissolving the Injunction (k).

Though even an Indictment for Perjury upon the Answer has been found by the Grand Jury, still the Answer has been allowed to maintain its ground, and an Injunction held not to be thereby revived (l).

The exceptions are, it seems, cases of *Waste*, or on the *Infringement of Patents* (m), and some other cases, such as *Fraud* (n), or *Mischief* analogous to *Waste* (o), but *Lord Eldon* disapproved them, and refused to let Affidavits be read upon an Injunction to restrain the Negotiation of a Bill of Exchange (p). And where a Motion was made after an Answer, for an Injunction *to stay *Waste*, where no previous injunction had [*367 been obtained, Affidavits filed after the Answer, in support of such Motion, were not allowed to be read (q).

If the Bill is so framed, that, taken with the Answer, the Defendant, at Law would have a Defence in Equity, though not at Law, the course is to stay, not the Trial, but Execution (r).

When the Injunction is dissolved on the merits, the Court, in disposing of the Costs, will consider if there was a fair ground for bringing the Cases Before the Court; if not, the Plaintiff pays the Costs (s).

Upon showing cause against dissolving an Injunction upon the coming in of the Answer, in a Case of an alleged Piracy of a

(h) 1 Turn. & Ven. 248.

(i) Scott v. Mackintosh, 1 Ves. & Bea. 504.

(k) Clapham v. White, 8 Ves. 36, 7.

(l) Ibid. 8 Ves. 36.

(m) See Strathmore v. Bowes, 2 Dick. 673. S. C. 2 Bro. C. C. 88. 1 Cox. 263; and noticed in note to Gibbs v. Cole, 3 P. Wms. 255. See the observations on that Case, 19 Ves. 155. Norway v. Rowe, 10 Ves. 153, and what is said in Smythe v. Smythe, 1 Sw. anst. 253.

(n) Gibbs v. Cole, 3 P. Wms. 254.

(o) Isaac v. Humpage, 1 Ves. jun. 427. S. C. 3 Bro. C. C. 463.

(p) Peacock v. Peacock, 16 Ves.

49. Norway v. Rowe, 19 Ves. 144.

Charlton v. Poulter, ib. 148, in note.

(q) Berkley v. Brymer, 9 Ves. 356; and see Hanson v. Gardiner, 7 Ves. 311. Smythe v. Smythe, 1 Swanst. 254.

(r) Smythe v. Smythe, 1 Swanst. 252.

(s) White v. Steinwack, 19 Ves. 85.

(s) — v. Waskett, 31 Jan. 1818, before the Vice Chancellor.

Work, it will be referred to the Master, to see whether they are the same compilation (t).

If the Answer denies any intention of committing Waste, the Injunction will be dissolved (u); but it is not a sufficient inducement to the Court to dissolve an injunction for staying Waste, that the Defendant in his Answer swears he has not committed any Waste, *since the filing of the Bill*; for as he thus admits he has done Waste before, the Court will presume he may do further Waste (z).

Where an injunction was granted, and a Commission to examine Witnesses in India, and the commission had been obtained two Years, and not returned, the Injunction was on Motion dissolved (y).

368*] If an injunction be obtained on the Merit, and the Plaintiff dies, a Motion may be made to dissolve it unless the Suit is revived within fourteen days, upon service of the Notice of Motion on the Plaintiff's Clerk in Court and his solicitor, and also on his Widow (z). When a Defendant dies, pending an Injunction to restrain proceedings in an Ejectment, the Heir at Law may move that the Plaintiff in Equity may revive within a Week, or the Injunction be dissolved (a).

The effect of an Amendment *after* the Answer is put in, will be afterwards observed upon.

6. *Motions of Amendment of Pleadings.*

PLEADINGS in Equity are not considered with that strictness as Pleadings at Common Law are. This doctrine obtained very early in the administration of Equity; and in many old Cases it is laid down that advantage cannot be taken for mispleading, or want of form, if the substance of the matter be sufficiently disclosed (b).

If the Plaintiff conceives, from any matter offered by the Defendant's Plea or Answer, that his Bill is not properly adapted to his Case, he may obtain leave to amend his Bill (c). But if the Bill states a Case which is contradicted by the Answer, and no Evidence can be brought to sustain the Bill, no relief can be 369*] given, although the Defendant by his Answer, *states a new Case upon which relief might be given if the Bill had been amended, stating that new Case (e).

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| (t) <i>Carnan v. Bowles</i> , 2 Bro. C. C. 84. — <i>v. Leadbetter</i> , 4 Ves. 681. | and see <i>Townsend v. Lowe</i> , 1 Cox. 410. <i>Gilb. For. Rom.</i> |
| (u) <i>Strathmore v. Bowes</i> , 3 Bro. C. C. 88. | (a) <i>Hill v. Hoare</i> , 2 Cox. 50. |
| (z) <i>Anon.</i> 3 Atk. 485. | (b) <i>Divers. Cur.</i> 106. 9 Edw. 4. 15. 24 Edw. 3. 45. 14 Edw. 4. 7. 37 |
| (y) <i>Penny v. Edgar</i> , 1. Anstr. 276. | <i>Hen.</i> 6. 43. 29 Ass 13. |
| (z) <i>Brown v. Warner</i> , 1808. MS. ; | (c) <i>Redes. Tr. Plead.</i> 260. edit. 3. |
| | (e) <i>Harwood v. Tooke</i> , MS. |

An amended Bill is considered as an original Bill (*f*); and new Subpœnas are not necessary (*g*), unless where there is a new engrossment of the Bill; for where there is not a new engrossment the Plaintiff undertakes to amend the Defendant's Copy, and that gives him notice (*h*). In such case the practice is, that on service of the Order to amend (*i*), the Defendant must bring his Office-Copy to the Plaintiff's Clerk in Court to be amended, and is *at liberty* to put in a further Answer within eight days after service of the Order, before which time the Plaintiff cannot file a Replication (*k*).

A Defendant having appeared, and answered the original Bill, the Plaintiff afterwards amended it, at which time, the Defendant was out of the Jurisdiction; application was made that Service on the Clerk in Court in the original Suit might be deemed good Service, but the Court refused the Motion, saying, it was never done except in the case of an Injunction Bill, when it would be gross injustice that one Man should be prosecuting an unrighteous demand at Law, and yet put himself out of the reach of the subpoena of this Court, in a Cause instituted for the purpose of restraining such proceedings (*l*).

*And where the Bill is amended after Answer, by adding a Defendant, the original Defendant cannot answer the amended Bill, nor consequently, have any order for time to answer (*l*). It has been held, that by amending the Bill the Defendant is no longer bound by offers or submissions in the Answer to the original Bill (*m*), but that seems questionable.

In one Case it is said, that after a *third* Order of Amendment a Defendant will be allowed taxed Costs (*n*), and in another Case, that he will be allowed such Costs on a *fourth* Order of Amendment (*o*); but in other Cases it was held, that though the Plaintiff amends several times after Answer, yet he shall not pay taxed Costs, but only forty Shillings (*p*), unless there is particular oppression (*q*).

After an Answer to a Bill of Discovery only, a Motion, as of course, to amend the Bill, by adding a *Prayer for Relief*, was refused with Costs (*r*). A different Rule prevails in the *Exchequer* (*s*). Such an Amendment might, perhaps, upon a spe-

(*f*) Lord Abingdon v. Butter and another, 1 Ves. jun. 210. Angerstein v. Clarke ib. p. 250; and see Hail v. Camp, 1 Dick. 199. Bagehaw v. Batson, 1 Dick. 106, 113.

(*g*) Ib. 1 Ves. jun. 250; and see Sherington v. —, 4 Ves. 66.

(*h*) See Hail v. Camp, 1 Dick. 199, and see Arg. in Carlton v. Menzies, 10 Ves. 443; see also Vernon v. Vawdry, 2 Atk. 199.

(*i*) Anon. MS. 20 June, 1818.

(*k*) Lloyd v. Lloyd, 2 Cox, 431.

(*l*) Roberts v. Worsley, 2 Cox, 389.

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(*l*) Gill v. Matthews, 3 Anstr. 879.

(*m*) Lord Abingdon v. Butter, 1 Ves. jun. 210; but see Spurrier v. Fitzgerald, 6 Ves. 548.

(*n*) Weedon v. Fell, 2 Atk. 123.

(*o*) Rannet v. Greene, 1 Cox, 253.

(*p*) Deggs v. Colebrooke, 1 Atk. 396.

(*q*) Earl of Massarene v. Lynden, 2 Bro. C. C. 291.

(*r*) Butterworth v. Bailey, 15 Ves. 358.

(*s*) 2 Fowl. 300.

cial application, be allowed in this Court; but even in those special Cases *Lord Eldon* seemed to think, it would be better to direct the Plaintiff to pay the Costs, and file a new Bill; and if in that case any use is to be made of the Discovery given by the first Answer, to let it be read as an Answer, to a Bill of Dis-371*] covery, as *evidence; not as part of the Defence, or admission, upon which the Bill proceeds (t). There is no instance in which an Amendment has been allowed to such a Bill, for the purpose of adding Parties. If, however, the Defendant answers such amended Bill, the Court, it seems, will entertain the Suit (u).

A *Pauper* is not allowed to amend his Bill by leaving out some of the Defendants, without paying their Costs (x).

After a *Demurrer*, or a *Plea*, which is not set down, an Amendment may be made of the Bill on payment of twenty Shillings Costs (y), and the Plea is thereby allowed (z); but after a Plea (a), or a general *Demurrer*, is set down and argued, (it is different when the *Demurrer* is only to part of the Bill) (b), the Bill cannot be amended (c); and to avoid this consequence the Court has sometimes, instead of deciding upon the *Demurrer*, given the Plaintiff liberty to amend his Bill, paying the Costs incurred by the Defendant, and this has been frequently done in the Case of a *Demurrer* for want of Parties (d). After a Plea is set down, and before it is argued, the Plaintiff may move to amend his Bill, but in such case the Plea will be allowed with Costs (e).

872*] After Witnesses are examined, the Bill cannot, in *general, be amended, (except to add Parties (f)), or upon a special application, under particular circumstances, to amend the Prayer for relief (g), unless the Plaintiff withdraws his Replication (h), or no Witness has been examined (i).

Where the Answer of one of several Defendants was replied to, and it was found necessary to amend the Bill, it was proposed to the Defendant to withdraw the Replication, and pay him his Costs, and thus be in a condition to amend. He would not agree to that; and thereupon it was moved to dismiss the Bill

(t) *Butterworth v. Bailey*, 15 Ves. 363.

(u) 3 Atk. 303.

(x) *Wilkinson v. Belcher*, 2 Bro. C. C. 272.

(y) 1 Ves. jun. 448.

(z) 2 Dick. 441.

(a) *Cholmondeley v. Clinton*, 2 Meriv. 74.

(b) *Redeas Tr. Pl.* 176.

(c) 2 P. Wms. 300. 1 Dick. 68, cited *Harrison's Ch. Pract.* Newl. Edit. p. 62.

(d) 2 Ch. Cas. 197. 2 Eq. Ca. Abr. 170, cited *Redeas Tr. Pl.* 175.

(e) *Lopes v. De Tastet*, 3 Madd. Rep. 183.

(f) 2 Atk. 15. 3 Atk. 371.

(g) 2 Atk. 2, 3. 3 Atk. 503. *Pack v. Clinton*, 12 Ves. 48. *Albrecht v. Sussman*, 2 Ves. & Bea. 327. *Redeas Tr. Pl.* 227.

(h) 1 Atk. 51. 1 Ves. jun. 142.

(i) *Redeas Tr. Pl.* 262, edit. 3, and Cases there cited, and *ib.* 266.

as to him, and then the Plaintiff amended by again making him a Defendant, and adding the other necessary Amendments (k).

Where after Replication, and Subpœnas to rejoin, a Motion was made for leave to amend, stating the nature of the intended Amendments and not requiring a further Answer, the Motion was refused; the Bill being filed in 1814 to set aside a Purchase made in 1799, for Fraud, inferred from great undervalue; the Defendant, by his Answer, denying a knowledge of the value at the time of making the Purchase, and the Amendments sought to be made tending to fix him with knowledge of that fact, and such as to require an Answer (l).

After an undertaking to speed a Cause, the Plaintiff* [*373 cannot, *as of course*, obtain an Order to withdraw his Replication and amend his Bill (m).

After a Cause is set down, (unless in the case of an Infant (n), who has been permitted to amend his Bill even after the Cause has been brought on to be heard) (o), an Amendment of the Bill is, in general, only permitted for the purpose of making Parties; but no *new charges* can be introduced, or any material fact put in issue which was not so in the Cause before; for such a purpose, a *Supplemental Bill* is necessary (p).

In some Cases, where a matter has not been put in issue by a Bill with sufficient precision, the Court has, upon hearing the Cause, given the Plaintiff liberty to amend the Bill for the purpose of making the necessary alteration (q).

A mistake *merely clerical* may be amended even after a Cause is brought on to be heard. As where, on a Bill filed by some Parishioners, the usual words, "*on behalf of themselves and all others the Parishioners*," were by mistake omitted, and an objection was made on that ground, the Chancellor thought he might allow the Amendment, even in that stage of the Cause (r); and a greater indulgence than that has been allowed; such as an *Amendment* by striking out the names of several Plaintiffs, and also part of *the Prayer of the Bill, between the hear-* [*374 *ing of the Cause, and the giving of the Judgment* (s).

Where a Modus had been set up as a Defence to a Bill for Tithes, and it appeared from the evidence in the Cause that there was probably a good ground for opposing the Plaintiff's claim, though the defendant had mistaken it, the Court permitted him to amend his Answer (t).

(k) Cowell v. Simpson, MS.

(l) Dean and Chapter of Christ Church v. Simons, 2 Meriv. 467.

(m) Ryan v. Stewart, 1 Cox, 397.

(n) Pritchard v. Quinchant, Ambl. 149. 1 Atk. 405. 1 P. Wms. 428.

(o) 2 P. Wms. 401, 403. 2 Atk. 529.

(p) Goodwin v. Goodwin, 3 Atk. 370, and see Jones v. Jones, 3 Atk. 111.

(q) 3 Bro. P. C. 194.

(r) Attorney-General v. Newcombe. 14 Ves. p. 6.

(s) Wollands v. Crowcher, 12 Ves. 174; and see also Palk v. Clinton, ib. 66.

(t) Redced. Tr. Pl. 294, ed. 3, and the Cases there cited.

Though a Cause is sometimes allowed to stand over to add a Party against whom a Decree in a plain Case is to be made, yet the Court will not allow of an Amendment in order to enable the Party to make a new Case (u).

So, after a Decree, an Amendment, making an Administrator a Party, has been permitted. If any thing in the Decree affected him by way of order to pay, the Amendment would not have been allowed, but being merely that he might be a Witness to what was done, it was permitted (x). If a new Examination is necessary, a *Supplemental Bill* must be filed (y).

If an irregularity arises in any alteration of a Bill by way of Amendment, it may be taken advantage of by Demurrer. As, if a Plaintiff amends his Bill, and states a matter arisen subsequent to the filing of the Bill, which consequently ought to be the subject of a Supplemental Bill, or Bill of Revivor, it is demurrable (z). But if a Matter arisen subsequent to the* filing of the Bill, and properly the subject of a Supplemental Bill, is stated by Amendment, and the Defendant answers the amended Bill, it is too late to object to the irregularity at the hearing (a).

A Demurrer to an amended Bill is bad, but it was agreed by the Lord Chancellor that it might be good where the Amendment is of a new Prayer, demurrable to, or when the Amendments show the former Prayer of Relief to be demurrable, but otherwise no Demurrer can be allowed to the Amendments, the Answer to the original Bill being an admission of the Equity, so far as for the Court to proceed upon it. It was said that at Law, where a Plaintiff after Plea put in, amends his Declaration, the Defendant is entitled to plead *de novo*, and may demur to the Declaration, but the Lord Chancellor said the rules of pleading at Law, and this Court, are different, and overruled the Demurrer (b).

Where facts appear upon an Answer to an original Bill, which would operate to avoid the defence made by Plea to an amended Bill, the Answer to the original Bill was read on the Argument of the Plea to counterplead the Plea (c); so, it seems, if the Answer to an original Bill should disprove an averment in a Plea to an amended Bill, the Court may permit it to be read for that purpose (d).

Whether an Answer may be amended or not, is very much in the discretion of the Court (e).

(u) *Deniston v. Little*, 2 Sch. & Lefr. 11 in note.

(x) *Fox v. Mackreth*, 1 Ves. jun. 69.

(y) *Jones v. Jones*, 3 Atk. 110.

(z) 1 Atk. 291, cited *Redesd. Tr.* Pl. 169.

(a) *Redesd. Tr.* Pl. 169.

(b) *Emott v. Ayliff*, 22 May, 1754.

MS.

(c) 2 Atk. 155. *Gillb. Chan.* 58.

(d) *Redesd. Tr.* Pl. 242. edit. 3.

(e) *Woodgate v. Fuller*, Barn. 50.

It is said, that the Defendant may, without notice, *move [*376 to amend his Answer in a *small matter*; but if it be in a material point, he must give notice of the Motion; and though it be in a material point, and after Issue joined, the Court will, on an Affidavit of *Surprise*, and payment of Costs allow of an Amendment (f).

Where a Defendant has mistaken a *Fact*, or a *Date*, the Court has given him leave to amend his Answer (g), and has also, under particular circumstances, allowed him to add a new Fact (h).

Where a Defendant, an Executor, had, by *mistake* in his Answer, admitted *Assets*, an amendment has been admitted (i).

The Rule, however, now seems to be, not to permit an Amendment of the Answer where there has been a mistake, but that the Defendant must move to put in a Supplemental Answer (k), and accompany the Motion with an *Affidavit*, in which he must swear, that when he put in the Answer he did not know the circumstances upon which he applies, or any other circumstances upon which he ought to have stated the Fact otherwise (l); or that when he swore *to his original Answer, he [*377 meant to swear in the sense which he now desires to be at liberty to swear to (m).

In one Case Executors admitted *Assets*, and afterwards a claim was made upon them for 5000*l.* which the *Assets* were insufficient to pay, upon which they moved for leave to file a Supplemental Answer, and supported the Motion by Affidavit, and leave was given to file a Supplemental Answer, without prejudice to the question on the hearing of the Cause, as to what ought to be the effect of the admission of *Assets* in the first Answer (n).

Where a Supplemental Answer will operate to the *prejudice* of the Plaintiff, it is matter of great difficulty to permit it, though the Court is inclined to yield to the application, if the object is to remove out of the Plaintiff's way the effect of a denial, or to give him the benefit of an admission, material, perhaps conclusive, to enable him to obtain a Decree. This permission, Lord

(f) 1 Eq. Cas. Abr. p. 29, in marg. In *Chute v. Lady Dacre*, 1 Chan. Cas. 29, it was held that, before Replication the Defendant might move to amend her Answer. But see *Harcourt v. Sherrard*, 2 Vern. 433.

(g) *Anon.* MS.

(h) *Wharton v. Wharten*, 2 Atk. 294. *Paterson v. Slaughter*, Amb. 292. S. C. 1 Dick. 285; but see *Countess of Gainsborough v. Gifford*, 2 P. Wms. 324. *Alpha v. Payman*, 1 Dick. 33.

(i) *Young v. Walter*, 9 Ves. 365. *Dolder v. Bank of England*, 10 Ves. 284 and *Dagley v. Crump*, 1 Dick.

35; *Sed vid.* *Rawlins v. Powell*, 1 P. Wms. 296. *Spurrier v. Fitzgerald*, 6 Ves. 566.

(k) It is so in the Exchequer, *Harris v. Daubeney*, 3 Anstr. 717, and see 2 Anstr. 443. *Ridley v. Obee*, 1 Wight 32.

(l) *Wells v. Wood*, 10 Ves. 402, and see *Jennings v. Merton College*, 8 Ves. 79, and also *Dolder v. Bank of England*, 10 Ves. 235.

(m) *Livesey v. Wilson*, 1 Ves. & Bea. 158.

(n) *Skerritt v. Worthington*, Jan. 1807. MS.

Eldon observed, "ought to have no influence upon a Prosecution." (o).

Where on a Bill for a specific performance of a Contract to 378*] purchase an Estate, the Defendant admitted* the Title by his Answer, and afterwards discovered a Will which was supposed to affect the Title, a doubt was entertained whether he could put in a Supplemental Answer objecting to the Title on the ground of the Will (q).

An Amendment of an Answer will not be permitted after an Indictment for Perjury preferred, or threatened, in order to avoid the Indictment (r).

An Answer has been allowed to be amended even after a hearing and a Decree, on an Affidavit of the Solicitor and his Clerk that the mistake was in the ingrossing the Answer from the Draft, the Draft being produced (s).

Where a Trustee by his Answer declined to act, and on the hearing of the Cause it was referred to the Master to appoint new Trustees, and the original Trustee afterwards agreed to act, application was made to the Court that the Master might be at liberty to amend his Answer in this respect, so as to enable the Court on a re-hearing to vary that part of the Decree. The Court refused the Motion; but thought the Master was at liberty, on the statement of the circumstances, to decline the appointment of new Trustees (t).

If Executors on a Suit against them, admit Assets, the Plaintiff may set down the Cause upon the Bill and Answer, and have 379*] a personal Decree against the *Defendants for their demands (u); and also for what may be found due on the Account in respect of Interest (x); but an admission of Assets by an Executor's Answer is, it seems, waved by the Plaintiff's going on to an account of Assets, and procuring a Receiver to be appointed (y). An admission of Assets by one Executor does not prevent the Plaintiff proceeding against the other Executor (z).

If a strong Case be made, the Court will relieve the Execu-

(o) *Edwards v. M'Leay*, 2 Ves. & Bea. 257, 8. In the *King v. Carr*, 1 Sid. 418. 2 Keb. 516, it was held, upon an Indictment for Perjury, in an Answer, to which Exceptions were taken, and a second Answer put in, giving an explanation that nothing can be assigned as Perjury which is explained by the second Answer, because the second Answer makes that, which was at first a Perjury, no Perjury; but Lord *Eldon* doubted whether that would now be considered as Law. See 2 Ves. & Bea. 258.

(q) *Const v. Barr*, 2 Meriv. 57.

(r) *Earl Verney v. Macnamara*, 1

Bro. C. C. 419; see contra *Woodgate v. Fuller*, Barn. 50.

(s) *Countess of Gainsborough v. Gifford*, 2 P. Wms. 427.

(t) *Miles v. Neave*, 1 Cox, 159.

(u) *Wall v. Bushby*, 1 Bro. C. C. 488.

(x) *Tew v. Lord Winterton*, cited 4 Ves. 606; and see *Foster v. Foster*, 2 Bro. C. C. 619. *Horsley v. Chaloner*, 1 Ves. 85.

(y) *Wall v. Bushby*, 1 Bro. C. C. 484.

(z) *Moreton v. Turville*, 2 P. Wms. 145.

tor from his admission of Assets (a); as if the Money was in a Banker's hands, who fails. To obviate an admission of Assets, a mistake must be proved, and that the circumstance on which the Executor built his admission, failed (b).

After a general admission of Assets, a Defendant has been permitted to amend her Answer, by admitting Assets to pay the Plaintiff's Debts, *if the same did not exceed 400l.* (c).

Where an Executor had, by his Answer, submitted to account for a residue, and afterwards found that as Executor he was entitled to claim the residue, he was not permitted to amend his Answer (d).

In a recent Case, before V. C. *Leach*, a Defendant admitted by his Answer that he had made a *Profit of 20,000*l.* [*380 upon certain Contracts, in respect of which he was declared a Trustee for the Plaintiffs. The Plaintiffs, not contented with this admission, insisted on an Account; on the Account being taken before the *Master*, he reported the Plaintiffs to be Creditors to the amount of 67,000*l.* Upon exceptions, it was held that Evidence was inadmissible before the *Master* to contradict the Answer (e).

If a Man admits by his Answer he has received certain Sums, which he had paid, &c., the discharge following immediately in the same sentence, the charge and discharge must be read together (f); but if he says by his Answer, that upon a particular day he received a sum of Money, he is not allowed, in an account before the *Master*, to discharge himself upon an Affidavit that he paid the Money to the Testator (g).

Liberty has been given to the Defendant after publication, to amend his Answer by striking out the admission of the Plaintiff's Pedigree (h); but the Court will not allow a Defendant to amend an Answer by striking out of it the admission of a Fact, where he does not swear he was surprised into the admission, or ill advised in setting it forth.

An admission of a *point of Law*, or of a consequence in Law, or of a consequence in Equity, does not bind the Party, because the Court is to judge of those matters (i). An admission in the Answer of the *Attorney-General binds not the King as [*381 to matter of Law, but as to matter of Fact it does (k).

(a) *Roberts v. Roberts*, mentioned *arg.* 1 Bro. C. C. 487.

(b) *Horley v. Chaloner*, 1 Ves. 85; but see *Roberts v. Roberts*, 2 Dick. 573, where an Executor was held to his admission of Assets though the Estate turned out insufficient.

(c) *Dagley v. Crump*, 2 Bro. C. C. 619, in note S. C.

(d) *Spurrier v. Ritzgerald*, 6 Ves. 566.

(e) *East India Company v. Keighley*, 4 Madd. Rep. 16.

(f) *Ridgeway v. Darwin*, 7 Ves. 405.

(g) *Thompson v. Lambe*, 7 Ves. 588.

(h) *Kinacote v. Bainsley*, 1 Dick. 485.

(i) *Pearce v. Grove*, 3 Atk. 523, S. C. *Ambler*, 65.

(k) *King v. Briggs*, 2 Bulstr. 235.

The Answer of a *Feme Covert* will not bind her as to her Inheritance, or her Husband (*l*).

If an Answer misnames the Plaintiff, it is to be considered as no Answer, nor is the Defendant bound by it. In such case there are many instances of permitting Answers to be taken off the file and resworn; but where the Defendant has discovered that there is contained in it what is false, innocently, according to his representation, disputed however by the Plaintiff, the Court will not order him to do an act that may expose him to an Indictment for Perjury, but will direct the paper writing, purporting to be an Answer, to be taken off the file (*m*).

A *Disclaimer* by Answer cannot be got rid of without a strong Case upon Affidavit (*n*).

When an Answer is amended, as it must, in the case of a common Defendant, be resworn; so, in the case of a Peer, it must again be attested upon honour; even though the Amendment be only in the Title of the Answer (*o*).

If a Bill be filed, and an Answer put in, and exceptions are taken to the Answer, and allowed, the Plaintiff, before the Answer to the Exceptions is put in, may amend his Bill, and move to have the Exceptions and Amendments answered at the same time (*p*); and if an Injunction was obtained on the filing of the 382*] *Bill, it will be continued until the Answer to the amended Bill (*q*). But *Lord Hardwicke* thought the Court had gone too far in allowing the amendment of Bills on these occasions (*r*): and it has been held, that if the Order to amend is not served before the Defendant answers the Exceptions, the Defendant is not obliged to answer the Amendments (*s*); and in a recent *Injunction Cause* it was determined, that where Exceptions are taken to the Answer, it is irregular to obtain an Order to amend, until the Exceptions are disposed of, for by that means a Party would obtain, indirectly, an opportunity of amending, without a special Order that such Amendment shall be without prejudice to the Injunction (*t*).

Amendments of *Demurrers* (*u*), and of *Pleas*, where there has been a clear mistake, have often been permitted (*x*). On the Amendment of Pleas, we have before observed.

When a Demurrer is overruled merely because the pleading is informal, the Court looks into the Case to see whether simply

(*l*) *Evans v. Cogan*, 2 P. Wms. 451.

(*m*) *Griffiths v. Wood*, 11 Ves. 62, 63.

(*n*) *Seton v. Slade*, 7 Ves. 267.

(*o*) *Peacock v. Duke of Bedford*, 18 Ves. 186.

(*p*) See *Long v. Burton*, 2 Atk. 218. *Partridge v. Hayercraft*, 11 Ves. 576, 577.

(*q*) *Mayne v. Hochin*, 1 Dick. 255;

and see *Adney v. Flood*, 1 Madd. Rep. 449.

(*r*) *Anon.* 3 Atk. 512.

(*s*) *Knox v. Simmonds*, 1 Ves. jun. 88. *Bethuen v. Bateman*, 1 Dick. 296. 11 Ves. 578.

(*t*) *Dixon v. Redmond*, 2 Sch. & Lett. 515, and see *Edwards v. John son*, Price's Exch. Rep. 204.

(*u*) 11 Ves. 70.

(*x*) 2 Bro. C. C. 143. 13 Ves. 435.

overruling the Demurrer is doing justice to the Parties. If the defect in point of form arises merely from the mistake or misapprehension of the Person who drew the Demurrer, the Court may by overruling it involve the Parties in great expense for no good purpose; it will therefore look into the general state of the Case, to see whether the Demurrer ought to be overruled without more, *and if it appears the Demurrer, had it [*383 been properly framed, ought to have been allowed, and that nothing but expensive litigation can attend the simply overruling the Demurrer, it may be proper to take a different course (y), and overrule the Demurrer, as defective in form, with liberty to apply to take the Demurrer off the File, and demur again, paying the expense of the Demurrer (z); or, a simpler course, the Court may direct the Demurrer to be withdrawn, the Defendant paying the Costs, with leave to amend it (a).

A mistake in the *Title of an Order* has been ordered to be amended, though to charge a Surety who gave a recognizance to abide the Order on the hearing (b). But where the Plaintiff's Christian Name was mistaken in the Title of Interrogatories, and the Depositions could not therefore be read, the Court would not permit the Title to be amended, though most of the Witnesses since their examination were gone to Sea (c). This Case is elsewhere reported (d); and Mr. Pooley (the reputed Author of the Work (e), that "great Man," as Mr. Viner calls him) adds, at the end of the Case, "but *quære*; for this seems only a mistake of the Clerk, whose errors are frequently amended, the better to carry on the Justice of the Court."

If, on a Bill filed, and an Answer thereto, an Injunction* [*384 has been obtained *on the merits*, a Motion to amend the Bill will be allowed, without prejudice to the Injunction (e); but it is not a Motion of course (f).

After a Defendant to an Injunction Bill has put in an Answer, upon which the Plaintiff has neither moved nor excepted, the general rule is that he cannot have an Injunction upon an amended Bill and Affidavit. Where the Plaintiff has come to the knowledge of circumstances subsequently to filing his original Bill, or the like (g); in such case, the Court has permitted

(y) *Devonshire v. Newenham*, 2 Sch. & Lefr. 207.

(z) *Ibid.* 212.

(a) *Attorney-General v. Corporation of Bristol*, 12 Feb. 1820, before V. C. MS.

(b) *Spearing v. Lynn*, 2 Vern. 376.

(c) *White v. Taylor*, 2 Vern. 435.

(d) 1 Eq. Cas. Abr. 30.

(e) See 1 Sch. & Lefr. 269, in note.

(f) *Turner v. Bazaleys*, 2 Ves. & Bea. 331. *Prac. Reg.* 210. 3 Bro. C.

C. 427, 8; and see *Welsh v. Hannam*, 2 Sch. & Lefr. 516. *Hearne v. Tenant and another*, 27 Jan. 1807, MS.

(f) *Travers v. Lord Stafford*, 2 Ves. 21. *Edwards v. Edwards*, 2 Dick. 757. *Lady Markham v. Dickenson*, 1 Ves. jun. 30. *Contra Edwards v. Jenkyns*, 2 Bro. C. C. 425, a Case I have known overruled.

(g) *Norris v. Kennedy*, 2 Sch. & Lefr. 515.

a *re-amendment* of a Bill after Answer, without prejudice to an Injunction, when the nature of the Amendment has been precisely ascertained, and a clear and positive Affidavit that the Plaintiff had not a knowledge of the facts, enabling him to bring the Case upon the Record sooner (*h*).

7. Motion to dismiss Bill.

At any time before a Rule to produce Witnesses (*i*), or even of a Rejoinder (*k*), (for as soon as Issue is joined the Defendant himself may proceed in the Cause) if *three Terms elapse* 385*] (*l*), without any proceeding* in the Suit, (showing cause against dissolving an Injunction is not considered as a proceeding) (*m*) an Order may be obtained to dismiss the Bill for want of prosecution; and this is a Motion of course, and consequently does not require Notice (*n*); and the Order of Dismissal will be good though an Injunction was obtained in the Cause (*o*), and whether common, or special on the Merits (*p*), though on the face of the Order it appears that the Six Clerk's Certificate was dated subsequent to the Order (*q*). The Order of Dismissal operates from the *making* of it, and not from the Service. So that if a step be taken in the Cause, an Amendment of the Bill, for instance, between the Order of Dismissal and the Service of it, it will not avail to prevent the Dismissal (*r*).

It was formerly usual to give Notice of the Motion, and upon the Plaintiff undertaking to speed the Cause, no Order of Dismissal was made (*s*); but now it is not considered as necessary that a Note should be handed over by the Defendant's 386*] Clerk in *Court previous to a Motion made *before Replication* (*t*), for the dismissal of a Bill for want of Prosecution (*u*);

(*h*) *Sharp v. Ashton*, 3 Ves. & Bea. 144. *Mair v. Thellusson*, *ibid.* 145, in note; and see *Maison v. Murray*, 2 Dick. 536.

(*i*) *Fell v. Morris*, 1 Cox, 176, and *vid.* 3 Atk. 558.

(*k*) *Tozer v. Tozer*, 1 Cox, 238.

(*l*) In the time of Lord Bacon, [Orders in Chan. Beam. Edit. p. 11,] only one Term was allowed; in the time of Tothill it was extended to *two Terms* [Proceedings, p. 15,] and in the reign of Queen Anne it was extended to *three Terms*. [See Wyatt's Pract. Reg. 375, and the note to *Day v. Snee*, 3 Ves. & Bea. 171.] It were better, perhaps, if the Practice in Lord Bacon's time, in this respect, had not been altered.

(*m*) *Earl of Warwick v. Duke of Beaufort*, 1 Cox, 111.

(*n*) *De Graves v. Lane*, 15 Ves. 291.

(*o*) *Day v. Snee*, 3 Ves. & Bea. 170.

(*p*) *Hannam v. South London Water Works*, 2 Meriv. 61.

(*q*) *Wills v. Pugh*, 10 Ves. 402. *Mahon v. Sisson*, 12 Ves. 465. 1 Ves. & Bea. 368.

(*r*) *Anon.* 24th April and 4th May 1818, before V. C. Leach. MS. *Sed vid.* 7 Ves. 222.

(*s*) See *Lyon v. Dunbell*, 11 Ves. 608.

(*t*) See *Browne v. Byne*, 1 Ves. & Beames, p. 310. *Attorney-General v. Finch*, 1 Ves. & Bea. 368.

(*u*) *Naylor v. Taylor*, 16 Ves. 127. *Jackson v. Pownall*, *ibid.* p. 205. *Attorney-General v. Finch*, 1 Ves. & Bea. 368, a Case determined after very considerable inquiry as to the Practice. See *Day v. Snee*, 3 Ves. & Bea. 171; and see *Bellingham v. Bruly*, 1 Madd. Rep. 265.

and from this correction of the practice it has been supposed that the Motion cannot be opposed, and that the Plaintiff has not, as formerly (x), an opportunity of undertaking to speed the Cause, a practice much complained of, as affording means of delay (y); but the general understanding of the Practice seems to be that the Plaintiff may appear on the Motion and undertake to speed the Cause; and although on a Motion to dismiss no one undertakes to speed the Cause, yet if before the Order is drawn up, an offer to speed the Cause is made, and to pay all the expenses incurred, the Court will direct the Order not to be drawn up; and though the Order has been drawn up, the Court will, on a special Application, retain the Bill, if the Application be made within a reasonable time, and is supported by an Affidavit stating merits, accounting for the delay, and offering to pay the Costs (z); but there is no instance where the Court has restored *a Bill which has been regularly [*387 dismissed, for the mere purpose of agitating the question of Costs (a).

Where upon a Motion to dismiss, the Plaintiff undertakes to speed the Cause, the Plaintiff has only the Term, and not the Vacation also, to proceed (b).

The Defendant becoming a Bankrupt does not disable him from moving to dismiss (c).

If the Plaintiff obtains an Order to *amend* his Bill, so long as that Order remains in force, a Motion to dismiss cannot be made. If the Party omits to amend his Bill, a Motion should be made that the Party shall amend within a given time, or that it should stand dismissed (d).

Where, however, a Cause on coming on to be heard stood over with liberty to amend, but no further steps were taken, a Motion was allowed to dismiss the Bill for want of Prosecution (e).

Where a Bill is filed merely for a Discovery, and prays no relief, a Motion cannot be made to dismiss for want of prosecution; but an Order should be prayed for, upon the Plaintiff, to pay to the Defendant the Costs of Suit, to be taxed by the Master (f).

Formerly, a Party was entitled to give, and abandon, *three* Notices of Motion for the dismissal of a Bill *for want of [*388

(x) As to the former practice, see *Bligh v. —*, 13 Ves. 445, and the Cases referred to in note.

(y) See Mr. Vesey's note to *Naylor v. Taylor*, 16 Ves. 127; and see 1 Ves. & Bea. 370.

(z) *Baker v. Mellish*, 11 Ves. 72. *Jackson v. Pownall*, 16 Ves. 204. *Attorney-General v. Finch*, 1 Ves. & Bea. 370. *Fuller v. Willis*, 3 Ves. & Bea. 1. *Day v. Snée*, *ibid.* p. 170.

(a) *Hannam v. South London Water Works Company*, 2 Meriv. 64, 5.

(b) *Wilson v. Simpson*, 2 Madd. Rep. 123. The Cases contra of *Mangleman v. Prosser*, 3 Bro. C. C. 191, and *Findlay v. Wood*, 1 Ves. & Bea. 499, are, it seems, misreported; but see what is said of the latter Case in the note to the 2d edit. of Ves. & Bea.

(c) *Monteith v. Taylor*, 9 Ves. 615.

(d) Anon. MS.

(e) *Mitchell v. Lowndes*, 2 Cox, 15.

(f) *Woodcock v. King*, 1 Atk. 286.

prosecution ; but he could not give a *fourth* Notice unless he had paid the Costs of the three previous Notices (*g*) ; now, however, according to the recent General Order before alluded to (*h*), the Party must pay the Costs of every Notice of Motion which is not followed up with a Motion.

If after Notice of a Motion for the dismissal of a Bill, the Plaintiff applies by Petition to the Rolls, and obtains an Order to amend, on the day on which the Motion would have been made, if the Seal had not been continued, this is regular (*i*) ; it does not appear whether the Order to amend was served or drawn up ; probably it was not, and if so, it confirms the Decision before alluded to (*k*).

If a Replication to an Answer be filed before a Motion to dismiss, an Order for that purpose cannot be obtained (*l*).

A Plaintiff can in no case dismiss his Bill without Costs (*m*), to be taxed (*n*), unless it be with consent (*o*) ; not even where the Defendant becomes a Bankrupt (*p*).

A Plaintiff (without Notice to, or the Consent of a Co-Plaintiff) may move to dismiss his Bill, so far as he is concerned, with Costs (*q*).

If a general Demurrer be put in, which is not argued, and no 389*] proceedings afterwards, the Defendant *cannot have the Bill dismissed for want of prosecution, as he had equally a power to move in the Cause (*r*) ; he should have set down the Demurrer for Argument (*s*).

No Order can be made upon a Bill that is dismissed, for that would be decreeing relief (*t*).

If the Plaintiff produces the Order for a Subpœna to rejoin, and an Affidavit of some of the Parties being out of the Kingdom, the Court will not dismiss his Bill for want of prosecution ; and though a Bill has been dismissed for want of such Order and Affidavit, yet upon producing them afterwards, and payment of Costs out of pocket, the Court has retained it ; but on a Motion to retain the Bill, the Plaintiff must show that the Order for the Subpœna to rejoin was dated before the notice to dismiss (*u*).

It has been held, that a *Defendant* cannot move to dismiss a Bill after publication is completely past (*x*). But a *Plaintiff* may in any stage of the cause apply to dismiss his Bill upon

(*g*) *Anderson v. Palner*, 14 Ves 151.
(*h*) See the General Order, 3 Madd. Rep. 318.

(*i*) *White v. Hall*, 14 Ves. 208.

(*k*) *Ante*, p. 385.

(*l*) *Anonymous*, 14 Ves. 492.

(*m*) *Dixon v. Parks*, 1 Ves. jun. 402.

(*n*) *Anon.* 1 Vern. 116. 2 P. Wms. 387.

(*o*) *Anon.* 1 Ves. jun. 140. *Fidelle v. Evans*, 1 Bro. C. C. 267.

(*p*) *Rutherford v. Miller*, 2 A netr 458.

(*q*) *Langdale v. Langdale*, 13 Ves. 167.

(*r*) *Anonymous*, 2 Ves. jun. 287.

(*s*) *Simpson v. Densham*, 2 Cox, 377.

(*t*) *Bennet College v. Carey*, 3 Bro. C. C. 390.

(*u*) *Anonymous*, 2 Atk. 604.

(*x*) *Skip v. Warner*, 3 Atk. 558.

Payment of Costs (y), even after an Issue has been directed, but not after a *Decree* (z). In a Case in *Dickens* (a) it is reported to have been held, that where an Issue *has been tried [*390 and decided in favour of the Defendant, the Plaintiff cannot dismiss, but the Report does not seem warranted by the *Registrar's* Book.

Where a Bill was retained for a twelvemonth, with liberty for the Plaintiff to bring an Action, "and in case the Plaintiff should not try such Action within a twelvemonth, then the Bill was to stand dismissed with Costs;" the Plaintiff did not try his Action within the time, and it was held the Bill is not *ipso facto* out of Court; but the Defendant must either set down the Cause for further Directions, or move to dismiss the Bill (b).

8. Motion for Production of Deeds, &c.

In general, wherever a Plaintiff has established an Interest in any Instrument, which by the Defendant's Answer is admitted to be in his hands, he is entitled to a production of it (c); for the Documents are by Reference incorporated into the Answer, and become a part of it (d).

If, therefore, Deeds, Letters, or other Writings, are referred to in an Answer, and admitted to be in the Defendant's custody (e), the same will on the Plaintiff's Motion be ordered to be left with the Defendant's Clerk in Court, for the inspection of the Plaintiff, his Solicitor or Agent (f); but though, *when- [*391 ever a Deed is made part of the Answer, and the contents are in a great measure set forth, and the Instrument is referred to for the truth of what is set forth, the production will be ordered (g); yet where the Answer admits the execution of an Agreement, and craves leave to refer to it when produced, but there is no admission that it is in the possession or power of the Defendant,

(y) In *Locke v. Nash*, 31st May 1816, where the Cause was at Issue and in the Paper, Mr. Wakefield moved on behalf of the Plaintiff to dismiss the Bill on Payment of Costs. Mr. Bell objected that in that stage of the Cause the Bill could not be dismissed, but admitted he could find no Authority; upon which the Master of the Rolls (Sir William Grant) made the Order.

(z) *Guilbert v. Hales*, 1 Ch. Cas. 40; and see 3 Atk. 558.

(a) *Carrington v. Holly*, 1 Dick. 230.

(b) *Stevens v. Praed*, 2 Cox, 374.

(c) *Smith v. Duke of Northumberland*, 1 Cox, 363.

(d) *Evans v. Richards*, 1 Swanst. 8.

(e) *Erskine v. Bize*, 2 Cox, 226.

(f) *Bettison v. Farrington*, 3 P. Wms. 364. 11 Ves. 42. Where a Defendant referred to Marriage Articles executed in *Spain*, which reference made it incumbent on her to produce them, and the custom of *Spain* being to deposit Articles and other Deeds in places appointed for that purpose, so that an authenticated Copy was all that could be had, the Court gave her liberty to amend her Answer by setting forth the custom of that Kingdom, with regard to the depositing of Deeds, 2 Atk. 294.

(g) *Atkins v. Wright*, 14 Ves. 214; and see *Herbert v. Dean and Chapter of Westminster*, 1 P. Wms. 775.

a production will not be ordered (*h*) ; for the Court could not enforce its Order, there being no *constat* upon the proceedings that the Party could obey (*i*). In such case the Party must amend his Bill and call for such admission as would found an order for the production.

The Plaintiff is entitled to the production of Documents referred to in the Answer, and admitted to be in the custody of the Defendant, although an Injunction obtained by the Plaintiff has been dissolved on the merits (*k*).

If an *Heir in Tail* files a Bill against *Devisees*, and they by way of Schedule set forth an abstract of several Settlements in their possession, the Court will not order an inspection of all the Deeds, but only of such Deeds in the possession of the Defendants as created an Estate in Tail general (*l*).

392*] *Where the Defendant alludes by his Answer to a Deed, not impeached by the Bill, as, for instance, a release of all claims whatsoever, "as in the said Indenture will appear," and claiming the same benefit as if he had pleaded it, *Lord Eldon* said, "he must produce that Instrument at the hearing of the Cause ; but his Answer means only, that in this stage he does not put his Defence on a Plea with Profert, stating merely that there is such an Instrument, which is to be his Defence, if he shall produce it ; not otherwise" (*m*).

If a Defendant submits to produce a Deed, he will be obliged to do so before the hearing, if the Court thinks fit (*n*) ; but a qualified submission to produce a Deed, "if the Court shall require it," does not fix the Defendant, and deprive him of the discretion of the Court, as to the propriety of the production (*o*).

Where a Bill seeks a Discovery of Deeds and Relief, the Court will not, upon Motion, unless by consent (*p*), aid the Plaintiff in his proceedings at Law, by ordering that an outstanding Term should not be set up by the Defendant (*q*), or the production of Deeds, &c. at the Trial of an Ejectment ; that being Relief the Party is entitled to only on a *Decretal* *Or- [*393 *der* (*r*) ; if the Bill prayed only for a *Discovery* and not for Relief also, the Deeds, it seems, would be ordered to be produced (*s*).

(*h*) *Darwin v. Clarke*, 3 Ves. 158.

(*i*) *Princess of Wales v. Lord Liverpool*, 1 Wils. C. C. 123.

(*k*) *Evans v. Richard*, 1 Swanst. 7.

(*l*) *Lord Shaftsbury v. Arrowsmith*, 4 Ves. 66. *Barton v. Neville*, cited 4 Ves. 67 ; and see what *Lord Eldon* says in the *Princess of Wales v. Lord Liverpool*, 1 Swanst. p. 121. S. C. 1 Wils. C. C. 121, approving those Cases, in opposition to a case contra, *Bettison v. Farrington*, 3 P. Wms. 363.

(*m*) *Atkins v. Wright*, 14 Ves. 211 ; but see *Gardiner v. Mason*, 4 Bro. C. C. 479.

(*n*) *Stanhope v. Roberts*, 2 Atk. 214.

(*o*) *Atkins v. Wright*, 14 Ves. 213.

(*p*) *Byrne v. Byrne*, 2 Sch. & Lefr. 537.

(*q*) *Hylton v. Morgan*, 6 Ves. 293. *Byrne v. Byrne*, 2 Sch. & Lefr. 537.

(*r*) *Ashton v. Lord Exeter*, 6 Ves. 288.

(*s*) *Hylton v. Morgan*, 6 Ves. 294.

The Rule as to producing Papers upon a *Trial at Law* is this : If the Court, on Motion, or by Decree, directs a Trial, that Trial is directed in such a way that all productions which the Court conceives to be useful upon that Trial shall be made ; but if a Bill be filed for an Injunction against an action, and prays Relief, the Injunction being refused, and they go on at Law to Trial, the Plaintiff can only read, by the direction of this Court, what he may read without that direction, the Answer ; and then he may read every Book, Letter, Memorandum, or Paper referred to by that Answer ; as every such Book, Letter, &c. is a part of the Answer. It is read as part of the Answer ; and the Plaintiff must show, that what he prays may be produced, is in effect and substance part of that Answer ; unless the Trial is directed by the Court itself on Motion or Decree ; but there is no instance of directing the Answer of any other Person, except the Defendant in that Cause, or any part of it, to be read upon a Trial, not directed by the Court itself (t).

In general, when a Defendant wants a Discovery of a Deed in the hands of the Plaintiff, he must file a Cross-bill for the purpose, although the Deed be referred to by the original Bill as being in his custody, and ready to be produced as the Court should *direct (u) ; and where a Bill was filed to set aside [*394 a Partition on the ground of inequality, and for a new Partition, stating a Valuation and Estimate, the gross result of which, without the particulars, were contained in a Schedule to the Bill, and the Answer denying the accuracy of the Valuation, but alleging the Defendant was unable to set forth in what particulars it was inaccurate by reason of such omission ; a Motion by the Defendant for production of the Valuation and Papers, &c. relative thereto, was refused, with Costs (x) ; but if a Bill be for an Account of Partnership Dealing, and the Plaintiff and Defendant are jointly entitled to the possession of Documents in the hands of the Plaintiff, the Defendant may move to stay proceedings for want of an Answer, until such Documents are produced (y).

The Court will not order that the Defendant may inspect a Deed proved in the Cause, and referred to by the Deposition as being part thereof, unless the same is set forth at length (z) ; for the Defendant before the hearing is not to see the strength of the Cause, or any Deed, to pick holes in it (a).

So, if Letters are referred to by the Plaintiff's Deposition, as

(t) *Marsh v. Sibbald*, 2 Ves & Bea. 375, 6.

(u) *Spragg v. Corner*, 2 Cox, 109 ; and see *Micklethwait v. Moore*, 3 Meriv. 292.

(z) *Micklethwait v. Moore*, 3 Meriv. 292.

(y) *Pickering v. Rigby*, 18 Ves. 484, confirmed in *Micklethwait v. Moore*, 3 Meriv. 286.

(z) *Housson v. Earl Winnington*, 3 P. Wms. 35.

(a) *Davers v. Davers*, 3 P. Wms. 410. S. C. 2 Str. 764.

exhibits, the Defendant is not entitled to an inspection of them (b).

395*] Inspection has been ordered, on Motion, of Articles* claimed by the Plaintiffs, as Heir Looms, in a Chost at the Bankers of the Defendant (c).

The Court will not order Deeds to be delivered out of Court to a *Devisee*, unless the Heir is before the Court (d).

When the Heir at Law by his Answer to a Bill brought to establish a Will admits it to be duly executed, he is not entitled to the inspection of the Title Deeds and Writings belonging to the Estate; but if by his Answer he insists upon some old Entail which has not been barred by a Recovery, or controverts the legality of the Will, or the execution of it, or insists that only a part of such real Estate is devised away, he is entitled to such inspection (e).

A Peeress will be ordered to produce Deeds confessed in her Answer, on *Honour* only, without Oath (f).

It is not sufficient that the Party swears that he has no Books, Evidences, &c. to *his knowledge*, concerning the matters in question but those produced; but he must swear without the introduction of the words, *to his knowledge* (g).

A Will referred to in the Defendant's Answer, but not offered to be produced, was, on Motion, ordered to be produced (h).

If a Defendant to a Bill, seeking the Discovery of a Correspondence, sets forth by his Answer *Extracts of Letters, and swears they are the only parts of the Correspondence upon the subject, it is sufficient (i); and a Defendant, it seems, cannot be compelled to produce *confidential Letters* (k); nor will the Court compel an Attorney to produce Papers of his Client (l).

Where, in the Answer, a reference is made to Extracts from Books of Account, the Defendant on production of them may seal up those parts of the Books which he swears to be immaterial (m).

If an Order be made that the Defendant should produce before the Master all Books, Papers, &c. and the Master is satisfied with the production that is made, but the Plaintiff is not, he

(b) *Wiley v. Pistor*, 7 Ves. 411.

(c) *Earl of Macclesfield v. Davis*, 3 Ves. & Bea. 16.

(d) *Anon.* 1 Ves. jun. 29.

(e) *Potter v. Potter*, 3 Atk. 719.

(f) *Duke of Hamilton v. Lady Gerrard*, Prec. Ch. 92, and Case there cited. *Sed vid.* *Sir Wm. Jones*, 152. Salk. 512.

(g) *Mayor of Hartford v. Poor of Hartford*, Vin. Abr. tit. Chan. (S. a. pl. 10.) S. C. Dom. Proc. 10 June, 1713.

(h) *Bird v. Harrison*, 15 Ves. 408.

(i) 1 Anstr. 58. *Bishop of Durham v. Beaumont*, MS. 15 Dec. 1803. *Campbell v. French*, 2 Cox, 286. In that Case, production of the whole of the Letters was refused; but the Defendant undertook that on the Trial the Plaintiff might read Extracts from the Schedules without reference to the body of the Answer. *Clifford v. Taylor*, 1 Taunt. 167.

(k) *Lord Cramstown v. Johnson*, 3 Ves. 179. *Sed vid.* 11 Ves. 42.

(l) *Wright v. Mayer*, 6 Ves. 280.

(m) 1 Anstr. 58.

may apply to the Court for an Order that the Master should receive further Interrogatories for the examination of the Defendant (n); nor is it previously necessary for the Master to be called upon to *certify* his satisfaction (o).

Where the object of a Bill is to set aside a Deed, the Court has the power of so dealing with the Instrument as to be reasonably sure of having it produced upon all occasions where its production may be necessary. Such Deed must therefore be produced for the purpose of being proved before the Examiner, *if necessary for the discovery of its contents; [*397 and must be produced at the hearing if necessary; and the Court will assume the custody of it in the interval, if a *special Case* is made (p). Where, therefore, a Motion was made that the Draft of a Title Deed might be deposited with the Master, upon an Affidavit that the settlement prepared in pursuance of the Draft varied from it, the Plaintiff being entitled to the Estate according to the Draft, the Defendant, according to the Deed; and the object of the Bill being to reform the Deed, and the Answer stating the substance of the Draft falsely, the Chancellor ordered the Deed to be placed in the custody of the Master (q).

A Bill was filed against a Steward for an Account of Monies received in that capacity, and of the Interest made by him of it, and he by his Answer admitted he received this Money, and mixed it with his own, and used it accordingly; this admission, it was held, was sufficient to induce the Court on a Motion for that purpose, to direct a production of his Banker's Books, though they might contain other private matters (r).

An Attorney submitting to produce Title Deeds of his Client in his Possession, as the Court shall direct, may be called upon to produce them, if the Principal could himself have been called upon so to do (s).

A Motion was made on the Part of the Plaintiff *for the [*398 production of a Deed alleged to be in the possession of the Defendant as Tenant in Common, but refused, it appearing by the Answer of the Defendant, that he had sold his Share, and was in possession of the Deed in question only as Mortgagee to the Purchaser; for a Mortgagee has no right to show the Title of his Mortgagor (t).

The course of proceeding for not producing Deeds before the Master pursuant to a Decretal Order, is, first to apply for an Order upon the Master's Certificate, that the Party do produce, &c. in four days, or that the Serjeant do apprehend the Defend-

(n) White v. Lupton, quot. 12 Ves. 392.

(o) Cotton v. Harvey, 12 Ves. 391.

(p) Beckford v. Wildman, 16 Ves. 438. See 1 Swanst. 125.

(q) Addison v. Walker, 16 Ves. 440.

(r) Earl of Salisbury v. Cicil, 1 Cox, 277.

(s) Fenwick v. Reed, 1 Meriv. 114.

(t) Lambert v. Rogers, 2 Meriv. 489.

ant, and bring him into Court to answer his Contempt; and if default is made, another Order must be obtained to make the former one absolute, upon the Master's Certificate of the same date with the Order (u). Should the Party be taken, he is brought into Court, and turned over to the Fleet, and thereupon the Court will of course grant a *Sequestration*. So if the Serjeant at Arms return *Non est Inventus*, the Court will, upon such return, grant a *sequestration* (x).

9. Motion for Payment of Money into Court.

WHERE it appears by the Defendant's *Answer*, or upon the *Examination* before the Master (y), or by the Master's *Report* 399*] (z), or by the Defendant's *Affidavit* (a), that Money is due, a Motion may be made for payment of the same into Court (b). But the Court will not order a Balance upon *Charge* and *Discharge* in the Master's Office to be paid in before the Master has made his Report (c).

In the Case of an Executor admitting to have Property of the Testator in his hands, it was formerly thought necessary for the Plaintiff to show that the Executor had abused his Trust, or that the Fund was in danger from his insolvent circumstances, but that is not now necessary (d); and in all cases not only upon *Affidavit* of the insolvency of the Executor, but where there is admission by him of a Balance in his hands, after Payment of Debts, he will be ordered to pay the Money into Court (e); and Lord Eldon has frequently stated the Rule still more broadly, and ordered into Court all Monies acknowledged by an Executor's Answer to be in his hands, except what might be necessary to be immediately applied; and so long as the Money is in Court, and not distributed, the Executor may apply for Money for Defence, &c. (f). And where an Executor by his Answer admitted a large balance of the personal Estate to be in his hands, he was ordered to pay the whole into Court, although he stated that an Action at Law was depending against him for a Debt to a considerable amount due from the Testator, but with liberty in case the Plaintiff *in the Action should recover, to apply to the Court to have a sufficient Sum paid out again. The Plaintiff in the Action did recover, and the Court ordered the Amount to be paid out to the Plain-

(u) *Carlton v. Smith*, 14 Ves. 180.
S. P. Anon. before V. C. Leach, 26
or 27 April 1819.

(x) See Register's Statement of
Pract. 2 Dick. 693, &c.

(y) *Quarrell v. Beckford*, 14 Ves.
178.

(z) *Gordon v. Rothby*, 3 Ves. 673.

(a) — v. Burchall, 24 July 1815,
before Lord Chancellor.

(b) *Quarrel v. Eckford*, 14 Ves.
178.

(c) *Fox v. Macreth*, 3 Bro. C.C. 45.

(d) *Strange v. Harris*, 3 Bro. C.
C. 365.

(e) *Blake v. Blake*, 2 Sch. & Lefr.
26. *Rutherford v. Dawson*, 2 Ball &
Beatty, 17.

(f) *Paxton v. Douglas*, MS.

tiff in the Action, and not to the Executor; and the Executor having improperly defended the Action, the Court reserved to the hearing of the Cause the consideration of the question, whether the Defendant should not answer personally to the Estate of the Testator for the Amount of such interest and Costs (*g*). When the Money is paid into the Bank it is always ready for those entitled to it when the time comes for paying it to them; and the Executor is discharged from any responsibility.

If a Bill be filed, stating a settled Account, and praying Relief, and by the Answer it is denied that the Account is just, and insisting that it ought not be decreed, the Plaintiff cannot move that the Defendant may pay into Court the Money on the Account so admitted, as he might if the Account were admitted to be correct. If the Bill be for a general Account, and there be an admission by the Answer of a Sum due, a Motion may be made for payment of the same into Court (*h*).

If an Executor by his Answer admits he received a Sum, which he has lent on bond, he will be ordered to pay the Money into Court (*i*).

The course in these cases is by a special Motion to move that the Executor may pay the Money into *Court within a [*401 certain specified time, and notice of the Motion must be served on the Party (*k*).

Though Executors have a power of laying out Money "on good and sufficient security" for an Infant, yet after a Decree to Account, and after Notice by the next Friend of the Infant Plaintiff not to lend the Money on Security, if they nevertheless lend the Money on Mortgage, they will be ordered to pay the same into Court (*l*); for after a Decree, an Executor cannot deal with the Assets for the purpose of Investment, without the leave of the Court (*m*).

If the Answer contains a Schedule not cast up, the Sum may be cast, and on an Affidavit of the Amount of what appears so due, a Motion may be made for Payment of the same into Court (*n*).

But where the Defendant by his examination does not admit that any thing is due, the Plaintiff is not allowed to calculate the items of the Schedules, and, without reference to the Principles on which the Account is to be taken, move to have what appears on such calculation paid in (*o*).

(*g*) *Yare v. Harrison*, 2 Cox, 377. (*l*) *Widdowson v. Duck*, 2 Meriv. 494.
 MS. (*h*) — *v. Bailey*, 30th July 1805. 494. (*m*) *Widdowson v. Duck*, 2 Meriv. 499.
 (*i*) — *v. Henshall*, Nov. 28th, 1806, MS. 499. (*n*) *Quarrel v. Beckford*, 14 Ves. 178.
 (*k*) *Hawkins v. Willis*, MS. 1810. (*o*) *Ibid.* 180.

The Motion is founded on the *admission* of the Party; and therefore it is not sufficient to cast up Books brought into the Master's Office, unless connected with an admission by the Defendant, so as to make those Books as much a part of his examination as the Schedules are part of the Answer. If *all* the 402*] Books of a Partnership are referred to in *the Answer*, a Motion cannot be made for Payment of Money appearing to be due on the Cash Book and Ledger only (*p*).

Money in the Funds belonging to Wards of the Court, cannot, it has been held, be transferred into the Name of the Accountant General, to the credit of the Cause, until the Account is taken by a Master, and his Report made; the Bill being filed for that purpose (*q*).

If the Vendor resists a Motion by the Purchaser, for payment into Court of the deposit in the hands of the Vendor's Agent, he will be charged with a loss occasioned by the Agent's failure (*r*).

With respect to the Payment of Purchase-money into Court, the following distinctions appear to have been taken:

A Purchaser who is not in Possession cannot be called upon to pay in his Purchase-money until the Title is completed, and a Conveyance is made to him (*s*); and if by the terms of the Contract he is to have Possession before the Conveyance is executed, the mere fact of his taking Possession under that Agreement will not entitle the Vendor to call upon him for payment of the Purchase-money into Court (*t*). If without any stipulation as to Possession, the Vendee takes Possession before the Title is completed, he is not (unless the Sale was under a *De-403**] *cree*) (*u*) compellable to pay in his Purchase-money* (*x*), more especially if there be *laches* of the Vendor in completing the Title (*y*); but, it seems, he must either do so, or give up the Possession of the Estate (*z*), or retain the Estate at an Occupation-rent, with a deduction of five-per-cent. on the Deposit-money (*a*). If, indeed, the Purchaser being in Possession, exercises acts of Ownership, as by erecting new, and pulling down old, Buildings—throwing two Meadows into one—making a new Garden—planting an Orchard—cutting down Timber—under-letting the Premises—changing the Tenants, or other similar acts of Ownership, he will be compelled to pay the Purchase-money into Court (*b*); and the taking of Possession, and

(*p*) *Mills v. Handson*, 8 Ves. 68, 91.

(*q*) *Benecraft v. Rich*, 1 Bro. C. C. 56.

(*r*) *Fenton v. Browne*, 11 Ves. 144.

(*s*) *Vid. Cutler v. Simons*, 2 Meriv. 510.

(*t*) *Ibid. Gell v. Watson*, 3 Madd. Rep. 225. *Contra Boothby v. Walker*, 1 Madd. Rep. 197.

(*u*) See the MS. note mentioned in *Sugden Vend. & Purch.* 201, last edit.

(*x*) *Clarke v. Elliott*, 1 Madd. Rep. 606.

(*y*) *Fox v. Birch*, 1 Meriv. 105.

(*z*) *Clark v. Wilson*, 15 Ves. 317. *Morgan v. Shaw*, 2 Meriv. 141.

(*a*) *Smith v. Jackson*, 1 Madd. Rep. 618.

(*b*) *Cutler v. Simons*, 2 Meriv. 103.

the acts of Ownership, though not mentioned in the Bill or the Answer, may be shown by Affidavit (c). Some surprise has been expressed that no distinction, in these cases, has been taken between acts of Ownership which are advantageous to the Estate, and such as are prejudicial to it, though in the former case it is obvious the value of the Vendor's Lien upon the Estate is improved (d).

If Money is not paid into Court pursuant to an Order for that purpose, a Motion, after Notice, may be made, that the Defendant shall pay it in within *a limited time (e), usual- [*404 ly a week or ten days; and if the Order made on such Motion is not complied with, a Writ of Execution issues (f), unless the Order for Payment of the Money is made against a Person who is not a Party to the Suit, in which case it is the practice, first to get an Order for Payment on a given day, and if he does not pay, then another Order is obtained, that he shall pay it by another day, or *stand committed* (g); but though the Party persists after his committal to refuse Payment of the Money, he will not, on Motion, be committed a close Prisoner (h).

If on a Bill filed by a Legatee, the Executor admits Assets, a Motion, it seems, may be made, to transfer to the Amount of the Legacy into the three-per-cents, in the Name of the Accountant General, to that Account (i).

On a Bill filed by a Trustee to have Accounts taken, &c. a Motion may be made by a Legatee that part of his Legacy may be paid to him, without prejudice to the question, out of what Fund the Legacy is to be paid, there being a clear Surplus, the Trustees, and all other competent Parties, consenting, and no opposition on the part of the Infants (k).

*10. *To take Bill and Answer off the File.* [*405

If a Suit be ended by compromise, the Bill and Answer will, by consent, on Motion, be ordered to be taken off the File (l).

11. *For a Commission to Examine Witnesses, &c.*

If the Plaintiff files his Replication in Term, he may sue out a Subpœna to rejoin, returnable in Term, but this rarely hap-

(c) Bradshaw v. Bradshaw, *ibid.* 492. Crutchley v. Jerningham, *ibid.* 502.

(d) See Bramley v. Teal, 3 Madd. Rep. 219.

(e) 3 Bro. C. C. 372.

(f) Higgins v. ———, 8 Ves. 381.

(g) Anonymous, 14 Ves. 207; and

see Bowes v. Lord Strathmore, 12 Ves. 325, and Angerstone v. Hunt, 6 Ves. 488.

(h) Call v. Mortimer, 4 Bro. C. C. 89.

(i) Pullen v. Smith. 5 Ves. 23.

(k) Pearce v. Baron 12 Ves. 459.

(l) Tremaine v. Tremaine, 1 Vern. 189.

pens, unless the Defendant lives in Town, and may be easily served with the Subpœna: the more usual way is to apply by Motion or Petition, which is of course, for a Subpœna to rejoin, returnable immediately, and that Service on the Defendant's Clerk in Court may be deemed good Service; and if it is in a Country Cause, the Motion or Petition also prays that the Plaintiff may be at liberty to take out a Commission for the examination of Witnesses, and that the Defendant may join, and strike Commissioners names in four days after notice of the same, or, that in default, the Plaintiff may have a Commission to examine Witnesses, directed to his own Commissioners (m).

The mode of joining in Commission is this: he who has the carriage of the Commission names a Commissioner, then the other Party names one, and so alternately, till each has named four, and afterwards each Party strikes out two of the Commissioners named by his adversary, and the remaining four are Commissioners (n).

406*] *Where Witnesses reside within twenty miles of London, their Evidence is taken by an Examiner for that purpose, and no Commission is necessary (o). Examiners, it seems, have no authority to take Depositions in the Country (p).

A Commission for the Examination of Witnesses returnable *sine dilatione*, must be executed before the second Return of the next Term after the Commission issues, and if executed after, it is void, and the Depositions will be suppressed (q).

The first application for a Commission, and the carriage of it, is the privilege of the Plaintiff, but the Defendant, if he thinks proper, may move for a Commission, and in some cases the Defendant may obtain a Commission for the Examination of his own Witnesses only, and have the carriage of it, as, where the Plaintiff will not go on to Commission, or the Witnesses live distant from the Plaintiff's Witnesses, or are beyond Sea, or the Plaintiff has no Witnesses; but the Plaintiff may join in such Commission, and cross-examine the Defendant's Witnesses on the Plaintiff's Interrogatories, or examine other Witnesses on such Commission (r).

He who has the carriage of the Commission must give fourteen days Notice under his Commissioners hands, of the time and place where the Commission will be executed, and such notice must be given to all the Defendants who join in such Commission (s).

(m) See Harrison's Chan. Pract. Newl. ed. 242.

(n) Ibid. 244.

(o) Harrison's Chan. Pract. Newl. edit. p. 250, 259, in note. 1 Vol. Turn. & Ven. Pract. 85, in note. But see Orders in Chancery, 109.

(p) Frankland v. Frankland, 1 Dick. 231.

(q) Jones v. Mitchell, 2 Vern. 197.

(r) See Harrison's Ch. Pract. Newl. edit. p. 245, 6.

(s) Ibid. 246.

*In the course of Proceedings on a Bill of Interpleader, [*407 a Commission issued on the part of one Defendant for the Examination of Witnesses, of which Notice was given to the Plaintiff, but not to the other Defendant, and was held (though the practice was inconvenient) to be irregular (*t*).

If there be any irregularity in the execution of the Commission the Depositions will be suppressed.

If a Witness who has been served with a *Subpœna ad testificandum*, refuses to attend (*u*), or attending, refuses to be sworn, he will be ordered to attend, and to be sworn in four days, and be examined, or stand committed (*x*); but he is not bound to attend upon a mere Summons of the Commissioners without the service of a *Subpœna* (*y*).

If an Order be made that the Defendant shall within four days put in an Answer to Interrogatories, or in default a Serjeant at Arms to go against him, and the Defendant puts in an insufficient Answer, the Serjeant at Arms will, on Motion, be directed to take him (*z*).

If a Corporation would examine any of their Members as Witnesses they must first disfranchise them. The method of disfranchising is, by an Information in the nature of a *Quo Warranto* against the Member, who confesses the Information, on which the Plaintiff obtains Judgment to disfranchise (*a*).

*Interrogatories for the Examination of Witnesses must [*408 be signed by Counsel.

The Interrogatories administered to Witnesses are all strung together, and the Party, by his Agent, points out the particular Interrogatories, or parts of Interrogatories, to which he wishes the Witnesses to be examined. The reason why the Interrogatories are all put together, is, that some Witnesses may be called to speak to one part, some to another, and some, perhaps, to all (*b*).

If a Commissioner in a Cause is intended to be examined as a Witness, he must be examined before any other Witness, otherwise his Deposition will be suppressed (*c*).

The Commissioners, it seems, have power to refuse what in their opinion does not amount to legal Evidence (*d*), but a Witness cannot demur to be examined because the question is not *pertinent to the Matter in issue* (*e*); but if Interrogatories be im-

(*t*) *Brymer v. Buchanan*, 1 Cox, 425.

(*u*) *Osman v. Fitzroy*, 1 Dick. 60. Hind. Pract. 329.

(*x*) *Hennegal v. Evance*, 12 Ves. 201.

(*y*) *Wardle v. Dent*, 1 Dick. 334.

(*z*) *Weston v. Jay*, 1 Madd. Rep. 527.

(*a*) *Mayor, &c. of Colchester v. 1 P. Wms. 596.*

(*b*) *Whitelock v. Baker*, 13 Ves. 515.

(*c*) *North v. Champernoon*, 2 Chan. Cas. 79.

(*d*) *Whitelock v. Baker*, 13 Ves. 515.

(*e*) *Ashton v. Ashton*, 1 Vern. 165. S. S. Eq. Ca. Abr. 41.

properly exhibited to a Witness he must *demur* (*f*); as if, for instance, he is a Party interested (*g*). Such Demurrers are set down like other Demurrers (*h*), but are held to very strict rules (*i*); and where a Witness demurred to an Interrogatory before 409*] cause he claimed an *Interest in the Land, the Demurrer was disallowed, because he did not swear to the Interest, nor what Interest he claimed (*k*).

A Witness may object to answering Questions which may have a direct tendency to criminate him, or render him liable to Disabilities or pecuniary Penalties (*l*).

The *East India Company* in all shipping agreements oblige Persons to covenant that they will discover transactions, though the Answer may subject the Parties to Penalties or Disabilities; but that applies to a Suit by the *East India Company*, and not to any other Person (*m*).

Counsel, Solicitors and Attornies, are privileged from being examined in respect of matters which came to their knowledge after they were retained (*n*); but a Steward, or Servant, has no such privilege (*o*); and an Attorney is compelled to prove his Client's hand-writing if called upon.

It is said, that if a Counsellor or Attorney consent to be examined, the Court will not refuse the reading of his Deposition (*p*); but where an Attorney has been examined, the Court will, 410*] on Motion, refer it *to the Master to see what part of the Evidence came to his knowledge in confidence (*q*).

If any stress be laid on the *hand-writing* of a Will, it seems, it cannot be made use of if only the *probate* be in Evidence (*r*); but on Motion and Notice, (for it is not an Order of Course) (*s*) an Order will be made upon the Register of the Court, where the will is, to deliver the original Will, for the purpose of being produced at the hearing, upon giving Security (*t*).

(*f*) *Bowman v. Rodwell*, 1 Madd. Rep. 265.

(*g*) *Hiddersley v. Devischer*, mentioned 2 Atk. 593.

(*h*) *Kiddersley v. Fisher*, Mos. 195. *Nightingale v. Dodd*, *ibid.* 228. *Parkhurst v. Lowton*, on Appeal to the Chancellor, 1010. S. C. contra before V. C. 3 Madd. Rep. 123.

(*i*) *Valiant v. Dodmead*, 2 Atk. 524.

(*k*) *Jefferson v. Dawson*, 2 Chan. Cas. 208.

(*l*) *Paxton v. Douglas*, 16 Ves. 239.

(*m*) *Ibid.*

(*n*) *Couts v. Pickering*, Ventr. 197.

(*o*) *Vaillant v. Dodmead*, 2 Atk. 524.

(*p*) *Maddox v. Maddox*, 1 Vez. 62. *Bishop of Winchester, v. Fournier*, 2 Vez. 445. *Sed quæ* for the rule is

adopted for the benefit of the Client. See Bull. N. P. 234. *Sandford v. Keymington* 2 Ves. jun. 189. In *Attorney-General v. Lester*, 13th July 1763, MS. a Demurrer was allowed by a Solicitor, examined as to matters which came to his knowledge by information only of his Client.

(*b*) *Sandford v. Remington*, 2 Ves. jun. 189. Of this Case, however, it was said in *Parkhurst v. Lowton*, 3 Madd. Rep. 124, that it afforded no Rule to follow, because it is for the Court, and not for the Master to judge whether the matter inquired of is confidential.

(*r*) *Bishop of Cloyne v. Young*, 2 Ves. 98.

(*s*) *Wells v. Corbyn*, 3 Anstr. 648.

(*t*) *Ford v. —*, 6 Ves. 802. *Hodson v. —*, *ibid.* p. 135. *Forder v. Wade*, 4 Bro. 476. *Williams v. Floy-*

Lord Hardwicke held, that where there is a variance between the original Will and the Probate, the cause must stand over, and the Parties are at liberty to apply to the Spiritual Court for Amendment, and if they see occasion, to make the proper alterations in the Probate (u).

When a Commission is granted to examine Witnesses to a Will in the Country, the Court, on application, will order the Prerogative Court to deliver a Will to be proved (x).

When a Commission is granted to examine a Witness to a Will, *who resides abroad*, the Court will, on Motion, order the original Will to be delivered out by the proper Officer of the Prerogative Court, upon Security being given to return the same, *in order to be carried out of the Kingdom. But [*411 this cannot be done if there be any other Person besides the Person applying, interested under the Will, unless he consents (y).

If a Commission is necessary for the Examination of Witnesses who live *abroad*, a Motion, on Notice, may be made for that purpose, if the Defendant is in contempt for want of an Answer, or has moved for further time to answer (z), accompanied with an Affidavit as to the materiality of the Witness (a).

Though an Injunction has been obtained against an Action, an Order may be procured for a Commission to examine Witnesses abroad, returnable *without delay* (the usual return in such cases) without paying the Money into Court (b).

The Examination of Witnesses *de bene esse* has already been considered (c).

Where a Commission for the Examination of Witnesses in *Lisbon* was executed, but the Ship in which the Depositions were sent to England was lost on the Passage, the Court ordered the Commissioners to transmit the *Drafts* of the Depositions and to certify the circumstances of the return of the Commission, but would not make any Order for the reading the Drafts on the hearing of the Cause until after the Commissioners had made their return and Certificate (d).

When a Commissioner issues for the Examination *of [*412 French Witnesses, who do not understand English, the Depositions are not to be taken in French, but must be translated by the Interpreter into English, and be so taken down and returned (e).

Depositions before Publication, will, on Motion, be suppress-

er, Ambl. 343. *Lake v. Causfield*, 3 Bro. 263. *Morse v. Roach*, 2 Str. 961. S. C. 1 Dick. 65, and the Case there noticed.

(u) *Marsh v. Howe*, 2 Atk. 50.
(x) *Morse v. Roach*, 2 Str. 961. S. C. mentioned 1 Atk. 628.

(y) See *Frederick v. Aynscombe*, mentioned Ambl. 343.

(z) *Cheminant v. De la Cour*, 1 Madd. Rep. 208.

(a) 1 Bro. C. C. 448.

(b) *Cock v. Donovan*, 3 Ves. & Bea. 76.

(c) Ante. p. 202, &c.

(d) *Burn v. Burn*, 2 Cox, 426.

(e) *Lord Viscount Belmore v. Anderson*, 2 Cox, 288.

ed for having been taken by the Commissioners *ready prepared*, and the Commissioners will be directed to re-examine that Witness ; but this Order does not, in cases of necessity, prevent the Court having recourse to the Depositions ; as where, for instance, the Witness could not be again examined.

When the interval is short between Publication and the Hearing, the Court will, on a Motion for that purpose, grant time to examine whether a Deposition was regularly taken, it being too late to object, on that ground, at the hearing of the Cause (f).

If the Interrogatories are *leading*, the Depositions, on a reference to the Master, and his report that they are so, will, on Motion, be suppressed. If one Interrogatory be reported leading, the Deposition only to that Interrogatory is suppressed ; so, if part of an Interrogatory be reported leading, so much of the Deposition as relates to and answers the leading part will be suppressed (g). Depositions will also, on Motion, be suppressed, for impertinence and scurrility (h).

413*] *Where, however, Depositions are suppressed, the Court will, under circumstances, allow an Application for leave to exhibit new Interrogatories for the Examination of the same Witnesses (i), to be settled by the Master (k), as, where the Title of the Cause was mistaken in the Commission (l), and where the Interrogatories were leading, and the leading seemed to be by inadvertency (m).

If the Solicitor acts as a Commissioner the Depositions will be suppressed (n).

The Depositions must be signed by the Witness ; and where a Witness dies after Examination, but before such Examination is signed by him the Depositions cannot be made use of ; but where the Defendant after publication, examined a Witness, and on the usual affidavit obtained an Order to re-examine this Witness, but the Witness died before a re-examination, the Court permitted the Defendant to make use of the former Depositions of the same Witness (o).

Depositions of a Witness who died before cross-examination,

(f) Gordon v. Gordon, 1 Swanst. 171.

(g) Newl. Har. 297, 298. Depositions to Interrogatories that are leading would not be suffered to be read on the hearing of the Cause, if that objection were pointed out, but in the Briefs to Counsel the Evidence is given, but not the Interrogatories, so that they cannot know whether the Interrogatories were leading. This duty therefore devolves on the Solicitor, who should always look at the Interrogatories to see whether they are leading.

(h) Sandford v. Remington, 2 Ves. jun. 189.

(i) Mentil v. Payne, 3 Anstr. 923.

(k) Lord Arundel v. Pitt, Amb. 585.

(l) Robert v. Millechamp, 1 Dick. 22.

(m) Spence v. Allen, Gilb. 150. Prec. Ch. 493 ; and see Sanford v. Paul, 2 Dick. 750, and Cases mentioned, ib. 754.

(n) Selwyn v. ———, 2 Dick. 563.

(o) Copeland v. Stanton, 1 P. Wms. 414.

the cross-interrogatories not going to any point which the Witness had been examined in chief, nor to his credit, but only to matters capable of proof by other Witnesses, have been refused to be suppressed, and were allowed to be read (*p*).

Depositions had been taken in India, where no proper Stamps could be had, and it was moved, and *ordered as of [*414 course, that such of them as were taken on Paper might be ingrossed on Parchment and duly stamped, and such of them as were taken on Parchment might be duly stamped (*q*).

Depositions have been allowed to be read, though taken during an abatement of the Suit (*r*).

The Clerks in Court copy the Depositions taken under a Commission; and the Examiners copy Depositions which they take (*s*); but no Copy is delivered out until Publication passes, by Order of the Court.

A Witness, it seems, may correct his testimony whilst he is yet present before the Commissioners (*t*); and the Deposition of a Witness has been allowed to be amended *before* (*u*), or *after* Publication, where a mistake has been made by the Witness, or the Examiner (*x*); and even after a Decree a re-examination by the Master has been ordered in a case of mistake (*y*).

Lord Eldon, however, refused to permit the re-examination of a Witness *before* Publication, the application being for liberty to explain and correct his former Evidence, and the Affidavit in support of the Motion being, that he had omitted to state a *material circumstance (*z*); and it has been considered [*415 as matter of great delicacy to alter a Deposition *after* Publication, and that nothing will justify it but the strongest conviction of a mistake having been made (*a*).

Lord King observed, "it would be hard, and unjust to pin a Witness down to what is a mistake, by denying to rectify it" (*b*); and in the case of *Judge Fox*, in the House of Lords, a Witness, the day after he had given his Evidence, was allowed to correct the statement he had made; but *Lord Eldon* observed, "such re-statement would be open to observation" (*c*).

(*p*) *O'Callaghan v. Murphy*, 2 Sch. & Lefr. 158.

(*q*) *Chitty v. East India Company*, 2 Cox. 190.

(*r*) *Thomson v. Tooke*, 1 Dick. 115. *Peters v. Robinson*, ib. 116; and see *Drew v. Vernon*, Cro. Car. p. 97.

(*s*) *Frankland v. Frankland*, 1 Dick. 231.

(*t*) *Lord Abergavenny v. Powell*, 1 Meriv. 131.

(*u*) *Kirk v. Kirk*, 13 Ves. 280. *Rowley v. Ridley*, 2 Dick. 677. S. C. 1 Cox, 281.

(*x*) *Griells v. Gansell*, 2 P. Wms. 646. *Ingram v. Mitchell*, 5 Ves. 299.

Darling v. Staniford, 1 Dick. 358. *Rowley v. Ridley*, 1 Cox, 281. contra

Randall v. Richford, 1 Chan. Cas. 25. (*y*) *Sandford v. Paul*, 3 Bro. C. C. 370. S. C. more full, 1 Ves. jun. 398.

(*z*) *Lord Abergavenny v. Powell*, Meriv. 130.

(*a*) *Rowley v. Ridley*, 1 Cox, 283.

(*b*) *Griells v. Gansell*, 2 P. Wms. p. 646.

(*c*) Dom. Proc. 22d June 1805, MS.

12. *Motion for Examination of Defendant or Plaintiff as a Witness.*

AN Order, at the instance of the Plaintiff, for examining a Defendant as a Witness, saving just exceptions, is an Order of course, and cannot be discharged upon a suggestion that the Defendant by his Answer appears to have an Interest. Though the Order is usually drawn upon a suggestion that the Party had no Interest, yet that is not considered essential to obtaining the Order. The objection must be reserved until the Deposition be offered to be read in evidence (d).

Unlike the Practice of Courts of Law, a Defendant also, may in Equity, previous to a Decree, move, as of course to examine 416*] a Co-Defendant, saving just *exceptions, where he is such, for form sake (e), or is not concerned in Interest (f), as where he is only a Guardian *ad litem* (g), or merely a Trustee, or disclaims (h). Even at Law, an Executor in Trust is considered as a competent Witness (i). So also a Defendant may be examined as a Co-Defendant when he is not interested in the matter to which he is to be examined (k), and no Decree sought against him; and, indeed, if it were otherwise, a Witness would probably be made a Defendant, merely to deprive another Party of his Testimony (l). The objection, if any, to such a Witness, on the ground of interest, must be taken at the Hearing (m).

If a Decree is sought against a Defendant he cannot be examined (n).

If a Defendant examines Witnesses, it will be considered that he is concerned *in interest*, unless it be collusively done (o).

If a Defendant is examined to matters wherein he is interested, he may *demur* (p).

A Defendant having been examined under the usual Order as 417*] a Witness, may have a Decree against *him upon other matters to which he was not examined (q).

The Depositions of a Defendant examined without service

(d) *Lee v. Atkinson*, 2 Cox, 415.

(e) *Mann v. Ward*, 2 Atk. 229.

(f) *Dixon v. Parker*, 2 Vez. 222.

(g) *Walker v. Thomas*, 2 Dick. 781.

(h) 2 Chan. Cas. 214, in the note of the Reporter, who is supposed to have been Serjeant Maynard.

(i) *Bettison v. Bromley*, 12 East, 250.

(k) *Murray v. Shadwell*, 2 Ves. & Bea. 401.

(l) *Ballew v. Russell*, 1 Ball &

Beatty, 99. *Franklyn v. Colquhoun*, 16 Ves. 219. *vid. Mayor and Aldermen of Colchester v. —*, 1 P. Wms. 596. *Piddock v. Browne*, 3 P. Wms. 238. *Prec. Chan.* 411.

(m) *Murray v. Shadwell*, 2 Ves. & Bea. 406.

(n) Arg^o in *Buckmaster v. Harrop*, 1806. MS S. C. 13 Ves. 456.

(o) *Dizon v. Parker*, 2 Vez. 224.

(p) *Nightingale v. Dodd*. Ambl. 583.

(q) Ambl. 583.

of the Order of liberty so to do, cannot be read, it being a surprise on the other Party (r).

A Defendant may move to examine the Plaintiff as a Witness, saving all just exceptions, if the Plaintiff himself consents to be examined (s); and a Plaintiff may without the consent of the Defendant, move to strike out of the Bill any of the *Co-Plaintiffs'* names whom he wishes to examine, on giving Security for Costs (t).

If the Evidence of a *Co-Plaintiff* be necessary, and the Defendant will not consent to his Examination, the Bill on Motion may be amended, and such *Co-Plaintiff* made a Defendant, and the Replication withdrawn, on the terms of amending the Defendant's Copy of the Bill, and requiring no further Answer (u).

A *Co-Plaintiff* has been allowed, by consent, to be examined to prove a Deed to which he was the only surviving Witness (x).

If a Plaintiff choose to examine a Defendant as a *Wit. [*418] ness, he cannot have a Decree against him (y); and if from the nature of the case that Defendant would be primarily liable to the Plaintiff, and another Defendant only in a secondary degree, the Plaintiff loses his remedy altogether (z).

The Examination of Witnesses after Publication will be considered afterwards (a).

13. Motion to enlarge Publication.

PUBLICATION in a Case, is, the disclosing of the Depositions and giving out Copies of them, and this is done by the Examiners or Clerks in Court, in pursuance of Rules or an Order of Court, or by consent of Parties. A Rule is first given to *produce Witnesses*, which expires in eight days inclusive, and then a Rule to *pass Publication*, which also expires in eight days inclusive. The eight days in each of these Rules must be days in Term; and neither of them can be given unless entered in eight days before the expiration of the Term. They may be entered by the Defendant if the Plaintiff neglects to give them for one Term (b).

The Court will not enlarge Publication on the application of

(r) *Mulvany v. Dillon*, 2 Ball & Beatty, 413.

(s) *Walker v. Wingfield*, 15 Ves. 178; and see *Armiter v. Swanton*, Amb. 393. *Troughton v. Getley*, 1 P. Wms. 596, in note; S. C. 1 Dick. 382. *Mayor and Aldermen of Colchester v. —*, 1 P. Wms. 596, and *Hewson v. Tookey*, 2 Dick. 799. *Motteux v. Mackreck*, 2 Dick. 735.

(t) *Witts v. Campbell* 12 Ves. 493. *Lloyd v. Makeam*, 6 Ves. 145; and see *Tappen v. Norman*, 11 Ves.

Sed vid. Motteux v. Mackreth, 1 Ves. jun. 142, and S. C. Dick. 735.

(u) *Motteux v. Mackreth*, 1 Ves. jun. 142. *Lloyd v. Makeam*, 6 Ves. 145.

(x) *Whately v. Smith*, 2 Dick. 650:

(y) *Bernal v. Marquis Donegal* Dom. Proc. 3 vol. Dow. Rep. 153.

(z) *Thompson v. Harrison*, 1 Cox, 344.

(a) See post, p. 421.

(b) 1 Turn. & Ven. 91. *Wahmsley v. Elliot*, 1 Dick. 84.

a Party who has taken the Depositions of the opposite Party out of the Office, although by Mistake (c).

Where no Witnesses have been examined on either side, Publication may be enlarged; and if *Witnesses have been examined, and previously to Publication it appears that there may be occasion for further testimony, and it cannot be had without danger of injustice to other Parties, the course is, upon a *special Case* (d), supported by *Affidavit* (e), to move that Publication may be enlarged.

In the *Exchequer*, Publication has been enlarged, and a new Commission ordered to examine the Defendant's Witnesses on an Affidavit as to his ignorance of what the Witnesses have sworn, though he might have examined his Witnesses on the former Commission (f). More than one application to enlarge Publication has succeeded though the Cause has been set down, where it was so far off in the Paper that it was improbable it would be heard before the time for the enlarged Publication expired (g).

The Party's want of knowledge of the Rules of Proceeding, or want of attention in the Solicitor, are not sufficient grounds to enlarge Publication; and in all cases where publication is enlarged the Affidavit must be express, that the Party, his Clerk in Court and Solicitor, have not seen, or been informed of, and that they will not see, and be informed of, the contents of the Depositions until the enlarged time of Publication (h); and in these cases the other Party may not only cross-examine, but examine at large (i).

420*] It has been said, that there is not in Equity any *power of cross-examination (k); but that is not quite correct; a cross-examination is allowed on the examination of each Witness; or if a cross-examination is afterwards found necessary, a Motion for that purpose to enlarge Publication, may be made, and the Witness cross-examined. If a cross-examination as to the execution of Deeds be necessary, the Court will on Motion make an Order in the alternative, that either the Examiner in whose hands the Deeds are should cross-examine, or that they should be delivered over to the Defendant's Examiner for that purpose (l).

If a Cross-bill is filed after an Answer has been put in to an original Bill, a Motion may be made to stay Publication until an Answer is put in to the Cross-bill (m); but it is not a Motion of

(c) *Sawrel v. Titchborne*, 2 Cox. 289.

(d) 13 Ves. 512.

(e) *Whitelock v. Baker*, 13 Ves. 512; and see *Anon.* 1. Vern. 253.

(f) See *Dingle v. Rowe*, 1 Wight. 99.

(g) *Moody v. Leeming*, 1 Madd. Rep. 85.

(h) 13 Ves. 512.

(i) 2 Vern. 253.

(k) *Vid. Pickering v. Lord Stamford*, 2 Ves. jun. 584.

(l) *Turner v. Burleigh*, 17 Ves. 354.

(m) *Ramskissement v. Barker*, 1 Atk. 20; and see *Creswick v. Creswick*, 1 Atk. 291. *Gardiner v. Mason*, 4 Bro. C. C. 478.

course (n) ; where, therefore, a Motion was made after Rules for passing Publication had issued, that the Publication in the original Cause might be enlarged until a fortnight after an Answer to the Cross-bill, the Motion was refused, with Costs, no special Case being made by Affidavit (o).

Where either material conversation, or an admission of the Defendant, occurs after Answer, or Replication or Examination of Witnesses, or if a new fact happens after Publication, which it is material to have before the Court in Evidence, when the original* Cause is heard, a *special Application* should [*421 be made for the opportunity of examining, and that the Depositions may be read at the hearing ; and if a Discovery is required the Party should file a Bill for that purpose merely, and move that the Answer comprehending the Discovery, may be read at the hearing of the original Cause (p). A *Supplemental Bill*, in such cases, is improper, and would be liable to a Demurrer (q).

14. *Motion for the Examination of Witnesses after Publication.*

DEPOSITIONS taken on the part of the Plaintiff were suppressed, as against some of the Defendants, on the ground of no Notice until after Publication ; but upon Evidence that the omission arose from a mistake committed by the Clerk to the Plaintiff's Solicitor, in giving at the Examiner's Office the name of the Clerk in Court for others of the Defendants, as the name of the Clerk in Court for all the Defendants, in consequence of which the Plaintiff's Witnesses were produced only at the seat of the Clerk in Court so named ; and upon the Examiner's Certificate that the name of that Clerk in Court only was delivered to him ; the *Lord Chancellor* gave to the Defendants the option, either of permitting the Plaintiff to re-examine the same Witnesses, or of allowing the Depositions to stand, with liberty for them to cross-examine those Witnesses and to examine others. The Court will exercise *the right of rectifying a mere [*422 slip in any of its proceedings (r).

It seems, that if a Witness is *interested*, and is known to be so previous to the Examination, a general Interrogatory should be framed, requiring him on his cross-examination to answer whether or no he is interested ; and if he untruly denies that he is interested, the Party affected by his Evidence may discredit the Witness, by examining other Witnesses as to the truth of that proposition (s) ; and if a Party has omitted to examine a Wit-

(n) *Dalton v. Carr*, 16 Ves. 93. (q) *Ibid.*
 (o) *Cook v. Broomhead*, 16 Ves. (r) *Cholmondeley v. Clinton*, 2
 133 ; and see *Aylet v. Easy*, 2 Ves. Meriv. 81.
 336. (s) *Purcell v. Macnamara*, 8 Ves.
 (p) *Milner v. Lord Harewood*, 17 326 ; and see *Callaghan v. Rochefort*,
 Ves. 148. 3 Atk. 643.

ness as to his Interest in the Suit, he may *before Publication* move, on Affidavit, for leave to re-examine the Witness as to the fact of Interest (t); and even *after Publication*, it seems, a Witness will be allowed to be examined as to his credibility, where the objection to the credibility arose from a matter that came to the knowledge of the Party after the Examination (u). *Mr. J. Powell*, indeed, seems to have thought that as to the distinction taken, that after Publication no Examination can be had as to the competency of a Witness, but only as to his credit, it was a difference without colour of reason (x); but the distinction appears to be established.

In a modern case (y), a Witness had been examined, and afterwards there were suspicions that he was interested, either, 423*] personally, or as a Trustee, *and an Issue was directed, in order that upon his Examination in the Court of Law, questions might be put to him to discover his Interest; though he said he thought the Court might order an Interrogatory to be exhibited to him in the nature of a *voir dire*.

If Evidence as to the *credit* of a Witness be taken in the Examination *in chief*, a Motion may be made to refer the Interrogatories to the Master on the ground of impertinence (z); but after Publication has passed, the Court will, upon articles left with the Examiner, or in the Six Clerks Office, when the Deposition is taken by Commissioners (a), on a *Special Motion* (b), give the Party liberty to examine Witnesses by general *Interrogatories*, as to the *credit* of the Witness, and in contradiction of such facts sworn to by the Witness, *as are not material to what is in Issue in the Cause*; for Witnesses in that stage of the Suit are not permitted to be brought to vary the Case in Evidence, by testimony that relates to the matter in Issue, under the pre-424*] tence *of examining to credit only (c). Indeed, if such Evidence were allowed, there might be no end of Suits. The Court, however, on a Motion to Examine as to credit and other

(t) *Vaughan and others v. Worrall*, 2 Madd. Rep. 322, affirmed on Appeal.

(u) *Callaghan v. Rochefort*, 3 Atk. 643.

(x) *Needham v. Smith*, 2 Vern. 463.

(y) *Stokes v. M'Kerrall*, 3 Bro. C. C. 228.

(z) *Mill v. Mill*, 12 Ves. 406.

(a) *Newl Harr*. 283.

(b) In *Russell v. Atkinson*, 2 Dick. Rep. 532, it was considered as a *Motion of course*; but that if the Party stated a considerable time after Publication, and did it merely for delay, it might be a ground to discharge the Order. According to the 72d Order of Lord Chancellor Bacon, 'No examination is to be had of the credit of

any Witness but by *special Order*, which is sparingly to be granted." 4 vol Bacon's Works, folio Edition, p. 153; and such seems now to be the practice; see *Mill v. Mill*, 12 Ves. 406. But though it is a special Motion, it is not necessary in all cases that it should be accompanied by affidavits. *Wattmore v. Dickenson*, 2 Ves. & Bea. 268. In *Wood v. Hamerton*, 9 Ves. 145, Affidavits were filed, but none in *Purcell v. Macnamara*, 8 Ves. 324.

(c) See *Callaghan v. Rochefort*, 3 Atk. 643. *Barnesley v. Powell*, 3 Atk. 594. *Sanford v. —*, 1 Ves. jun. 399. *Wood v. Hamerton*, 9 Ves. 145. *Purcell v. Macnamara*, 8 Ves. 326. *Carlos v. Brooke*, 10 Ves. 49. *White v. Fussell*. 1 Ves. & Bea. 153.

facts, will not on the Motion consider whether the Examination relates to matters in Issue; but if the Examination is taken as to any fact in Issue, the Depositions will be suppressed (d). A Person is not allowed to discredit his own Witness (e).

It has been held, that though at Law you can examine only to the *general credit* of a Witness, it is otherwise in Equity, and that there, *particular charges* must be stated (f); but in a recent case it was held, an Examination as to particular charges is bad, and that all that can be inquired of is, whether the Witness is to be believed upon his Oath (g).

Though a Plaintiff has examined in chief a Witness on the Merits of the Cause, yet if it appears on his Answer to a subsequent Interrogatory that he is interested, the objection to his Evidence may be taken at any time previous to the Depositions being read (h).

After Publication, and a *cause is set down*, it is too late to examine to credit (i).

*Lord Hardwicke has observed, that no Commission [*425 was ever granted into *foreign Parts* to examine as to the *Credit* of a Witness, (and Ireland, he said, though belonging to the Dominions of the Crown of Great Britain, with respect to the Jurisdiction of the Court is Considered as a foreign Part,) because this would introduce a certain method of delay; and if it was ever to be granted upon great necessity, and in a Case of consequence, the only ground of it must be, that no Person in England could swear any thing as to the Witness's Credit (k).

If a Person *interested* in a Suit is examined, and is not objected to at the time of his Examination, yet, if on reading his Deposition at the hearing of the Cause, it appears on the *face of such Deposition* that he is an interested Witness, the Court will suppress the Deposition. This is frequently the case in Tithe Causes, where the Witness, on the face of his Deposition, appears to be an Owner of Lands subject to Tithes, respecting which question is made; and in such case, though the Evidence was not objected to at the time when it was taken, yet the Deposition is uniformly suppressed (l).

Where, however, a Witness was examined before the Decree, and had given Evidence in consequence of a Release, which by *mere accident* did not cover a very small Debt due to him in respect of which he was interested at the hearing, and therefore incompetent, a Motion was allowed, after the Decree,

(d) White v. Fussell, 19 Ves. 130.

(e) Purcell v. Macnamara, 8 Ves. 64.

327.

(f) Gill v. Watson, 3 Atk. 522.

(g) Anon. 3. Ves. & Bea. 94; and see 1 Ves. & Bea. 153. Ord. in Chan. (Beames' Edit.) p. 187, 188.

(h) Perigal v. Nicholson, 1 Wight.

64.

(i) Gill v. Watson, 3 Atk. 522.

(k) Collaghan, v. Rochefort 3 Atk.

643.

(l) Vid. Gwillim's Tithe Cases, p. 1255.

426*] to re-examine him by Interrogatories, as a Witness in *the Cause. It was contended the Interrogatories should be settled by the Master; but this was thought not to be consonant with the Practice, and was not ordered. *Lord Thurlow* said, in his determination of this Case, that if he had any reason to suspect that by any other thing than a slip they had so examined him, he would not allow another Examination; for if they had managed it in that way, the least they ought to lose would be the benefit of that Examination (*m*).

If a Man is examined as a Witness, and is at his Examination disinterested, but afterwards becomes interested, and Plaintiff in the Cause, his Depositions may be read (*n*).

It has been held, that if an *interested* Witness is *cross-examined* this makes him a good Witness, though otherwise he would not (*o*); but the subsequent Decisions seem to establish a different Rule (*p*).

The Court has allowed the Defendant after Publication to prove an old Paper found in a Parish Registry (*q*); and even after a Cause has been set down and once called on, but adjourned for the convenience of the Defendant's Counsel, the Court has on Motion, given leave to Relators to exhibit Interrogatories to prove a Copy of the Entry of a Will in the Registry 427*] try Book belonging to the Ecclesiastical *Court of the Bishop of Ely, the Will being above two hundred years old, and lost (*r*).

15. Motion to prove Exhibits *viva voce* at the Hearing.

THE Execution of Deeds, and the hand-writing of Letters, or Signatures thereto, or to Accounts, &c. &c. may be proved *viva voce* at the Hearing of the Cause, an Order, on Motion or Petition, being first obtained for that purpose. The Order must describe the Deeds by their Dates, and Parties Names; and Letters by their Dates, and from or to whom; and other matters intended to be proved must have a proper description. Office-copies of Judgments, Enrolment of Deeds, and various other Instruments, may be thus proved, and read at the Hearing; but a Will cannot (*s*), the Witnesses to which must be examined on Interrogatories, the adverse Party having a right to cross-examine the Witnesses as to the sanity of the Testator, the manner of execution of the Will, &c. &c. (*t*).

(*m*) *Sandford v. —*, 1 Ves. jun. 398.

(*n*) *Gross v. Tracy*, 1 P. Wms. 288. S. C. 2 Vern. 609; and see *Glynn v. Bank of England*, 2 Ves. 42. *Hawes v. Hand*, 2 Atk. 615.

(*o*) *Corporation of Sutton Colefield v. Wilson*, 1 Vern. 254.

(*p*) *Vid. Moorhouse v. De Passon*,

Coop. Rep. 300, and *Scott v. Fenwick*, Gwillim, 1250.

(*q*) *Clarke v. Jennings*, 1 Anstr. 173.

(*r*) *Attorney-General v. Thurnell*, 2 Cox, p. 2.

(*s*) *Harris v. Ingledeu*, 3 P. Wms. 93; and see 1 Atk. 203.

(*t*) 1 *Thurn. & Vea*. 91, 2.

A Subpœna may be obtained to enforce the attendance of Witness to prove a Deed, &c. *viva voce*, at the hearing of a Cause (u).

Exhibits proved *viva voce* at the Hearing are allowed only where the application is by the Party who is to make use of the Exhibits, but are never allowed on the application of the opposite Party (x).

*It is a rule in regard to *Exhibits*, that you can only [*428 prove the hand-writing of the Person to that Exhibit, or the hand-writing of the Witness; but cannot enter into any Examination whatever that will admit of a cross-examination (y); but the Court will examine *viva voce* upon the suggestion of any question as to an *Exhibit* (z).

Where a Cause was adjourned, liberty was given, on Motion, to examine, to prove that a Witness to a Deed, material in the Cause, was in Scotland, in order to prove the hand writing of the Witness (a).

In the *Exchequer*, where an *Infant* is a Party, and his Interest is concerned, the Court does not allow an Order to examine a Witness *viva voce* to prove a Deed or Exhibit; but the Witness must be examined in the Office upon Interrogatories (b).

16. Motion under the Statute for the usual Decree upon a Bill of Foreclosure.

WHERE a Foreclosure, or the Sale of mortgaged Premises is prayed, and the Defendant answers, and admits the Mortgage, he may, on Motion, in pursuance of the Statute, 7 Geo. 2, c. 20, apply for the usual Decree. The words of the Act are, "The Court shall make such Order or Decree as the Court might have made if the Suit had been brought to a hearing, and all Parties shall be bound by such Order or Decree to all intents and purposes as if such *Order or Decree had been made [*429 at or subsequent to the hearing of such Suit" (b); and on a Motion by the Plaintiff to discharge such Decree, and for liberty to amend the Bill, it was held, that such Decree cannot afterwards be discharged on Motion (c).

Cross-bill.

CROSS-BILLS, which have been compared to the *reconventio* in the Civil Law (d), were at first unwillingly allowed, great in-

(u) Newl. Harr. 232.

(x) Graves v. Budgell, 1 Atk. 445.

(y) Earl of Pomfret v. Lord Windor, 2 Ves. 479, 80; and see Graves v. Budgell, 1 Atk. 445.

(z) Turner v. Burleigh, 17 Ves. 353; and see Bank v. Farques, Ambl. 145.

(a) Ambl. 145; but see Prec. in

Chan. 64, and Lake v. Skinner, 1 Jac. & Walk. 9.

(b) Carleton v. Brightwell, 2 P. Wms. 463.

(c) Cadle v. Fowle, 1 Bro. C. C. 515.

(c) Ibid.

(d) See Gilb. For. Rom. c. 1.

conveniences being foreseen; and the Rules relating to them were introduced by *Sir Nicholas Bacon* (e). They may be filed before or after an Answer has been put in the original Bill, or before a Decree (f); but the original Bill must be answered before an Answer can be insisted on to the Cross-bill. If, however, the Plaintiff, after the Cross-bill filed, amends his Bill, he loses his priority (g).

What is termed a Cross-bill, is a Bill brought by a Defendant to a former Bill which is depending against the Plaintiff in the Cross-bill, or the Parties thereto, touching the matter of the Bill, or the facts set forth in the Defendant's Answer to such Bill. It is generally used as a Defence (h), and for the discovery of the facts in the Defendant's knowledge, which may assist the Defence in the first Cause (i); but after Publication in the 430*] original Cause, no Examination* is allowed under the Cross-bill as to matters in Issue in the original Cause; unless it be by direction of the Court (k). "No Rule," says *Lord King*, "is more sound" (l); and on this account, as before observed (m), Publication in the original Bill will be stayed until after an Answer to the Cross-bill (n). On Motion, the Court will direct the original and Cross-bill to come on together, and then they are considered as one Cause; and if there be Evidence in the Cross-cause sufficient to prevent relief in the original Cause, it is considered as Evidence in such Cause, though no Evidence was adduced in the first Cause, as ought, properly to have been done (o).

Where an original Bill was brought to be relieved against a Deed, and a Cross-bill was filed to establish it, the Plaintiff in the original Cause lay by and neglected his Suit, and the Plaintiff in the Cross-cause examined Witnesses, and got a Decree to establish the Deed. Afterwards, the Plaintiff in the original Suit examined his Witnesses, set down the Cause for Hearing, and obtained an Order for Re-hearing the Cross-cause at the same time, but *Lord Hardwicke* refused to re-hear the Cross-cause but upon the Evidence in that Cause; and said he could not make any Decree in the original Cause, the matter being determined by the Decree in the Cross-cause. He said, it 431*] might be hard, but it was the *Plaintiff's fault—he ought to have brought the Causes on to Hearing together; and if he was not prepared to examine his Witnesses in time, he might

(e) *Ward v. Eyles*, Mos. 382.

(f) 2 Eq. Abr. 177.

(g) *Steward v. Rowe*, 2 P. Wms. 435. *Long v. Burton*, 2 Atk. 218. *Rattray v. Darley*, 3 Atk. 724. *Johnson v. Freer*, 2 Cox, 371.

(h) 3 Atk. 812. *Ward v. Eyles*, Mos. 382.

(i) 1 Vol. Har. Ch. p. 166, and

Redesd. Tr. Pl. p. 7.

(k) *Redesd. Tr. Pl.* 65.

(l) *Ward v. Eyles*, Mos. 382.

(m) *Ante*, p. 420.

(n) *Ward v. Eyles*, Mos. 382. *Gardiner v. Mason*, 4 Bro. C. C. 473. *Anderson v. Lewis*, 3 Bro. C. C. 429; and see 1 Atk. 21.

(o) *Day v. Newman*, 2 Cox, 78.

have applied for further time ; and his Lordship dismissed the original Bill (*p*).

If a Bill is filed for the *specific performance* of an Agreement, a *Cross-Bill* will lie to have the Agreement delivered up or cancelled (*q*). If, however, a Person in Possession files a Bill for a Conveyance, and a *Cross-Bill* is brought to have the Possession delivered up, though the Bill in the first Cause is dismissed, yet the Plaintiff in the *Cross-cause* cannot succeed, his being a legal claim, enforceable by Ejectment (*r*).

If a Defendant to a Bill for a specific performance proves an Agreement different from that insisted on by the Plaintiff, he may have a Decree upon his Answer, submitting to perform the Agreement (*s*) ; formerly, a *Cross-bill* was resorted to, but now it would be dismissed, as being unnecessary.

A *Cross-bill* may be filed to answer the purpose of a Plea *puis darrein continuance*, at the common Law ; as, where after Replication and Issue joined, a *Release* has been obtained ; in such case, by a *Cross-bill*, the Release may be put in Issue (*t*).

Bills of this description must be filed before Publication has passed on the first Bill, unless the Plaintiff in the *Cross-cause* is content to go to a *hearing upon the Depositions already [*432 published ; or the Bill be filed by the direction of the Court (*u*).

In a *Cross-cause*, Service of Process upon the Clerk in Court of the Defendant, is good Service (*x*).

Evidence in the *Cross-cause* concerning the matters in Issue in the original Cause is not allowed to be read after a Decree in that Cause ; but such Depositions may be read as do not relate to the matters in Issue in the original Cause (*y*) ; and where neither Party examines Witnesses in the original Cause, the Depositions of Witnesses examined to the same matters put in Issue by that Cause, may be read at the hearing of the *Cross-cause* (*z*).

If the original Cause is heard before the *Cross-cause*, the Decree in the original Cause may afterwards be varied by the Decree in the *Cross-cause*, provided the *Cross-bill* was filed before the Decree in the original Cause (*a*).

The Court will not delay the original Cause on account of the *Cross-bill*, without something to warrant it, so that the Plaintiff in the original often happens to get a Decree ; but the Plaintiff in the *Cross-bill* may, by *Caveat*, stop the Enrolment for forty days, and then petition to re-hear and bring on both together (*b*).

(*p*) *Kenner v. Goulston*, 25th June 1745. MS.

(*q*) *Day v. Newman*, 2 Cox, 78.

(*r*) 1 Ves. jun. 113.

(*s*) *Fife v. Clayton*, 13 Ves. 546 ; and see 15 Ves. 525 ; and *Lindsay v. Lynch*, 2 Sch. & Lefr. 9.

(*t*) *Redeod. Tr. Pl.* 76.

(*u*) *Redeod. Tr. Pl.* 77. 3 Atk. 110.

(*x*) *Gardiner v. Mason*, 4 Bro. C. C. 478.

(*y*) *Wilford v. Brasely*, 3 Atk. 502. See *Patterson v. Slaughter*, Ambl. 293.

(*z*) 3 Atk. 502.

(*a*) *Hicks v. Conyer*, Vin. Abr. Title Decree (D) Ca. 16.

(*b*) *Kinsey v. Kinsey*, 2 Ves. 577.

433*] If a *Cross-bill* is filed to have an usurious Security *delivered up, without offering to pay the Sum really due, a Demurrer will lie (c).

If an Agreement is sought to be set aside as unconscionable, and without proper consideration, a *Cross-bill* may be filed to establish the Agreement, and for a specific performance (d).

A Party cannot by a *Cross-bill* question what is admitted by the Answer to the original Bill (e).

If a Bill be filed by Impropiators for the recovery of Tithe, and the Answer denies the Title as Impropiator, a *Cross-bill* may be filed to obtain a Discovery of the Title of the Plaintiffs in the original Bill, and a production of Title Deeds, &c. and a Discovery of the Title to the particular Tithe claimed, and whether the former Occupiers of the Land had ever paid that species of Tithe (f).

An Answer to a *Cross-bill* cannot be used as part of the Answer to the original Bill, but the Defendant having obtained the Discovery should move for leave to file a supplemental Answer (g).

Where a Plaintiff brings his Bill praying an Account against a Person, and allowances in that Account, the Defendant is as proper to make objections as if a *Cross-bill* had been brought (h). If upon the hearing of a Cause a *Cross bill* appears necessary to a complete determination of the Suit, the Court will direct it (i).

434*] *The Answer to a *Cross-bill* will not be allowed to be read in Evidence, though the original Bill and Answer were read, if there have been no further proceedings on the *Cross-bill* and Answer (k).

Cross-bills are liable to the same objections by Plea or Demurrer as original Bills, except Pleas to the Jurisdiction of the Court, or to the Person of the Plaintiff, unless such Bill is exhibited in the name only of a Person who is alone incapable of instituting a Suit, as an Infant, a Feme Covert, an Idiot or a Lunatic (l). A Demurrer for want of Equity will not hold to a *Cross-bill*, for the Defendant being brought into Court by the Plaintiff in the original Bill, he may avail himself of the assistance of the Court, without being obliged to show a ground of Equity to support its Jurisdiction (m).

(c) *Mason v. Gardiner*, 4 Bro. C. C. 496.

(d) See *Barnardiston v. Lingood*, 2 Atk. 133.

(e) *Berkely v. Ryder*, 2 Ves. 537.

(f) *Bowman v. Lygon*, 1 Anstr. 1.

(g) *Warden and Minor Canons of St. Paul's v. Kettle*, 2 Ves. & Bea. 16.

(h) *Ayliffe v. Murray*, 2 Atk. 59.

(i) See on this subject, *Redesd. Tr. Pl. 77*.

(k) *Bennet v. Neat*, *Wightwick Rep.* 325.

(l) See *Redesd. Tr. Pl. 235*.

(m) *Doble v. Potman*, *Hard.* 160. *Redesd. Tr. Pl. 165. 3d edit.*

Evidence.

WE shall now make some general observations on Evidence.

The Examination of Witnesses in Equity is not *viva voce*, as at Law, but proceeds by *Depositions* in Writing, and bears in this respect a resemblance to the course of the Civil and Canon Law (*n*). This mode of eliciting truth has not the advantages derivable from a *viva voce* Examination (*o*), and it has been justly termed, "a frail and imperfect mode *of examining [*435 into facts" (*p*). The looks, the manner and deportment of a Witness, are extremely material to confirm or discredit his testimony; and it is found by the experience of ages, that nothing does so effectually expose the truth as a cross-examination, which strikes so suddenly that fiction can never endure it (*q*). If however, in this manner, the truth is not so likely to be extracted from an unwilling Witness, yet on the other hand, a Witness is not liable to be goaded or cajoled into a perversion of the truth by a dexterous Advocate. For a Rogue, a *viva voce* Examination is the best; but for an honest man, *Depositions* coolly and deliberately made seem preferable. Courts of Equity have Jurisdiction only in matters relating to *Property*: the Life, the Liberty, and the Reputation of Individuals, can only come in question in Courts of Law; and as to these, the Constitution has wisely provided that the Subject shall have the benefit of a public, oral, Examination of Witnesses, and the inestimable advantage of a Trial by Jury.

The Chancellor, indeed, has a right to examine Witnesses *viva voce* (*r*); and it has been often done *after Publication*, where doubts have appeared in their *Depositions*, and the Examination has been to clear such doubts, and inform the conscience of the Court (*s*); but this power is sparingly exercised; and there never was a case where Witnesses have been examined *at [*436 *large* at the hearing (*t*), though the Court will then examine *viva voce* upon the suggestion of any question as to an *Exhibit* (*u*). The competency of the Court to administer an Oath *viva voce* is illustrated in the Case of one *Aylet*, who having perjured himself on a *viva voce* Examination was prosecuted for, and found guilty of, Perjury; and this Case was carried to the House of Lords; and the objection that the Lord Chancellor had no power to administer an Oath was principally, but unsuccessfully

(*n*) *Graves v. Budgell*, 1 Atk. 445.

(*o*) See what is said in *Binford v. Dommett*, 4 Ves. 762. See also, some observations on written Evidence, by Sir Wm. Scott, 1 Rob. Adm. Rep. 253, 254.

(*p*) Per Lord Erskine in *White v. Wilson*, 13 Ves. 87.

(*q*) *Wilmot's Rep.* 109.

(*r*) *Turner v. Burleigh*, 17 Ves. 354.

(*s*) *Bishop v. Church*, 2 Ves. 100.

(*t*) *Graves v. Budgel*, 1 Atk. 445.

(*u*) 17 Ves. 355.

(*x*) See *Moore v. Aylet*, 2 Dick. 641.

urged (x). In that Case, as in others (y), the Lord Chancellor himself administered the Oath, the *Registrar* being absent.

It has been said that the Rules as to Evidence are the same in Equity as at Law (z); and, generally speaking, it is so. If, for instance, a Witness is dead who has attested a Deed, it is not sufficient that you prove his hand-writing, but you must likewise show that he is dead (a), more particularly where an attesting Witness has lived abroad (b).

The Rules of Evidence at Law and in Equity, *Lord Hardwicke* observes, does not differ in general, but only in particular, cases, where *Fraud* is charged by a Bill, or in cases of *Trusts*, as to which Courts of Equity do not confine themselves within such 437*] *strict Rules as they do at Law, but for the sake of Justice and Equity will enter into the merits of the case, in order to come at *Fraud*, or to know the true and real Intention of a Trust or Use declared under Deeds.

But in some respects the Rules of Evidence in Equity, and at Law, differ. At Law, no Defendant can be examined as a Witness; but in Equity a Person made a Defendant for *form sake* may be examined in a Cause, saving just exceptions (c). So, a Trustee, though merely nominal in every other respect, cannot be examined at Law as to the merits or intention of a Deed, but he may be a Witness in Equity (d).

So, though an Administration is not taken out till after the filing of the Bill, yet if procured before a Cause comes to a hearing, in Equity, it is sufficient; but it is otherwise at Law, because there the Defendant may crave Oyer of the Letters of Administration (e). There are many cases also, in which the admission of certain Documents or Testimonies, not having the character of legal Testimony (f).

Though what is Evidence in a Court of Law is in general Evidence in Equity, yet in the application of those Rules diversities must necessarily arise from the different modes of proceeding in the two Jurisdictions (g); and there is Evidence 438*] used in a Court of Equity, which, from the subject to which it is applied, never can be called for, or brought forward in a Court of Common Law, and which by way of distinction may be termed *Equity Evidence*; and in respect of which, all the general Treatises of Evidence are silent (h). Of this description is the Evidence which may be adduced to reform a Settle-

(y) See *Gascoyne's Case*, 14 Ves. 183.

(z) *Manning v. Lechmere*, 1 Atk. 453, and said Arg^o in *Lady Ormond v. Hutchinson*, 13 Ves. 50.

(a) *Henley v. Philips*, 2 Atk. 48.

(b) *Ibid.*

(c) *Man v. Ward*, 2 Atk. 229.

(d) *Ibid.* 229.

(e) *Fell v. Lutwidge*, 2 Atk. 120.

(f) *Lupton v. White*, 15 Ves. 443.

(g) *Wood v. Strickland*, 2 Meriv. 464.

(h) In a late Work, *Philps on Evidence*, this deficiency is in some measure supplied.

ment; to show a mistake; in cases of Account; in cases of Fraud; and in regard to the specific performance of Agreements and Trusts; and in some other Cases. In the preceding parts of this Work we have, incidentally, treated of this species of Evidence, and a repetition is unnecessary; and as a collection of the Rules laid down as to Evidence in Courts of Law is beside the plan of this Treatise, a few detached remarks on the subject is all that seems here to be required.

The Evidence must apply to the Facts put in Issue, and if the Depositions are as to Facts *not in Issue*, they will not be permitted to be read (i). On the same ground, no notice will be taken of Evidence, by which it is attempted to introduce a Defence totally different from that made by the Answer (k).

Under *general Charges* in a Bill, as, that a Man is *insane* or addicted to *drinking* (l); or that a Woman was of *lewd fame* (m), or behaved in an **indecent manner* (n), particular Evidence in support of the general Charge may be given; but under a general Charge that a Wife had *misbehaved herself*, particular Evidence to prove *Adultery* was not allowed (o).

It has been said, that where the Defendant *believes*, the Court believes; but a Will not proved or admitted by the Heir at Law cannot be established if the Defendant says only he *believes* a Will was made (p). So, the Answer of an Administrator to a Creditor's Bill, stating that he *believes* the Debt is due, is not, it seems, a sufficient foundation for a Decree, without further Evidence (q).

If on a Bill to establish a Will, the Heir at Law admits the Will, and dies before the Cause is brought to a hearing, and by Bill of Revivor an Infant Heir is made a Defendant, and the Suit revived, the Bill must be proved *per testes* against such Infant Heir (r).

The Probate of a Will is not conclusive Evidence as to the effect of a Codicil, it being refused only in a very plain case (s).

If a Will be made in *French*, and the Probate is in *English*, and varies from the original, the Probate being in a different language is not conclusive (t).

A Will of Lands cannot be established in Equity unless the three Witnesses to it are examined, if **living* (u); and [*440

(i) *Clarke v. Turton*, 11 Ves. 240.
Whaley v. Norton, 1 Vern. 484;
 and see what is said Arg^o in *Strode*
v. Strode, 2 Chan. Cas. 196; but
 see contra *Hodgson v. Thornton*, Eq.
 Ca. Abr. 228.

(k) *Smith v. Clarke*, 12 Ves. 480.

(l) *Clarke v. Perium*, 2 Atk. 340.

(m) *Ibid.* 337, &c.

(n) *Watkyns v. Watkyns*, 2 Atk.
 97.

(o) *Sidney v. Sidney*, 2 Atk. 338.
 S. C. 3 P. Wms. 269.

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(p) *Potter v. Potter*, 1 Ves. 274.
Sed vid. 1 Ventris, 361. See 6 Ves.
 733.

(q) *Hill v. Binney*, 6 Ves. 738.

(r) *Sleeman v. Sleeman*, 2 Dick.
 787.

(s) *Sinclair v. Hone*, 6 Ves. 607.

(t) *L'Fit v. L'Batt*, 1 P. Wms.
 526.

(u) *Townshend v. Ivcs*, 1 Serj.
 Wilson's Rep. 216.

when an Issue *Devisavit vel non* is directed, the three Witnesses to the Will must be examined at Law (x).

Where, however, one of the Witnesses is abroad, at *Jamaica*, for instance, or in *India*, proof of his hand-writing is sufficient, and a Commission to examine him is unnecessary (y).

Where a Plaintiff makes a claim under a will, and the Defendant in his Answer admits the Will, but refers to it for greater certainty, the Will may be read from the Bill, where nothing turns upon the construction of it (z). If an Adult Heir at Law refuses an Issue on the hearing of the Cause, the Court will establish the Will against him, though he does not admit it.

Where the Answer to a Bill for *Discovery only* is used as Evidence, the whole must be read (a); and where *Relief* is prayed, and the Answer replied to, the Plaintiff reading admissions must proceed to the completion of the immediate subject to which the Defendant is answering, according to the course *of 441*] Evidence at Law; but this does not apply to distinct matter (b).

If an Answer be not replied to, it is as before observed (c), considered as true.

As to *Costs*, indeed, an Answer may be read by the Defendant, though the Plaintiff does not read it as Evidence, but *Depositions*, unless read in the Cause, cannot be read as to *Costs* (d).

If the Answer be read, and it is insisted that there is a *mistake* in the Office-copy, the original Answer will be sent for from off the File (e).

Co-Defendants may read any thing proved on the part of the Plaintiff, because that is proof examined to, against all the Defendants (f).

Examinations before Commissioners of Bankrupt will not be admitted to be read, unless the Plaintiff has proved in the Cause that there were such Examinations taken before the Commissioners (g).

(x) *Bootle v. Blundell*, Coop. 138.

(y) *Lord Carrington v. Payne*, 5 Ves. 411.

(z) *Owen v. Jones*, 2 Anstr. 505.

(a) *Boardman v. Jackson*, 2 Ball & Bea. 286. *Lady Ormond v. Hutchinson*, 13 Ves. 53. *Butterworth v. Bailey*, 15 Ves. 362. In this last Case the Lord Chancellor is reported to say, "The Answer to a mere Bill of Discovery cannot be read here for any purpose;" but that, I apprehend, is a mis-report, and contradicted by other passages in the same Judgment. The Cases before cited show that such Answer may be used here as Evidence, and for that pur-

pose Cross-bills are usually filed. In 2 Turn. & Ven. Pract. p. 813, there is the form of a Petition for leave to read such an Answer as Evidence on the hearing of the Cause.

(b) *Lady Ormond v. Hutchinson*, 13 Ves. p. 47.

(c) Ante; and see *Wright v. Nutt*, 3 Bro. C. C. 340.

(d) *Howell v. George*, 1 Madd. Rep. 13.

(e) *Countess of Gainsborough v. Gifford*, 2 P. Wms. 425.

(f) *Walker v. Preswick*, 2 Ves. 623.

(g) *Eade v. Linwood*, 1 Atk. 203.

The *Answer* of a Defendant, though Evidence against himself, is not Evidence against another Defendant (*h*), since, in such case, there is no opportunity for Cross-examination (*i*); but where one Defendant said by his *Answer* that he was much in years, and could not remember the matter charged in the Bill, but that J. S. was his Attorney and *transacted the [*442 business, and J. S. was made a Defendant, his *Answer* thus referred to was admitted to be read against the Co-Defendant (*k*). And the *Answer* of a Defendant not brought to a hearing, has been read as Evidence against another Defendant at the hearing (*l*).

Where a Defendant disclaims all right, his Evidence cannot be read as a proof of the Plaintiff's right, to the prejudice of another Defendant (*m*).

So, if a Defendant may by possibility be liable to Costs, his Evidence is not admissible in favour of a Co-Defendant (*n*); especially if he is also a Trustee (*o*).

The Evidence of Bond Creditors of the Testator is not admissible to obtain a Decree for payment of a Legacy, as they must be preferred to Legatees (*p*).

The Office-copy of a Bill cannot be read in Evidence if the original is not upon the File, though an Officer of the Court is ready to prove that the original cannot be found among the Records (*q*).

If the Defendant refuses to produce the *Office-copy* of the Bill, the *Draft* of the Bill cannot be read, but the *Record* must be inspected (*r*); as it must also if the *Office-copy* is said to be wrong, as, through negligence, it frequently is.

A Decree at *Leghorn* has been allowed to be read *as [*443 Evidence, and the Court will not overrule what was so determined (*s*).

An Order to read in one Cause, the Bill, *Answer*, and the rest of the proceedings in another Cause, is good, where it is between the same Parties; but such Order cannot be extended to a third Person who was no Party to such Cause (*t*).

Depositions taken in a former Cause cannot be read in another Cause against one who does not claim under the Party against whom those *Depositions* were read. But if a Legatee

(*h*) *Cheevers v. Geohagen*, 6th March, 1720, Dom. Proc. noticed in Lord Harcourt's MS. Tables.

(*i*) *Morse v. Royal*, 12 Ves. 355. *Jones v. Tuberville*, 2 Ves. jun. 11. *Aakew v. Poulterers Company*, 2 Ves. 90.

(*k*) *Anon.* 1 P. Wms. 300.

(*l*) *Pitt v. Willis*, 1 Dick. 24.

(*m*) *Hill v. Adams*, 2 Atk. 39.

(*n*) *Barret v. Gore*, 3 Atk. 401. *Eade v. Lingood*, 1 Atk. 204; but see 2 Bro. C. C. 204.

(*o*) *Twining v. Morrice*, 2 Bro. C. C. 330.

(*p*) *Jones v. Tuberville*, 2 Ves. jun. 11.

(*q*) *Lord Irvin v. Simpson*, 7 Bro. P. C. 306, 317. Toml. edit.

(*r*) *Huddleston v. Briscoe*, 11 Ves. 513.

(*s*) *Burrows v. Tamereau*, 1 Dick. 41. S. C. Select Cases in Ch. 69; and 2 Str. 733.

(*t*) *Eade v. Lingood*, 1 Atk. 203.

brings a Bill against the Executor, and proves Assets, another Legatee, though no Party, may have the benefit of those Depositions (u).

A Demurrer to a Bill on the ground that the Discovery sought may criminate the Defendant, is not to be construed as an admission of the allegations in the Bill, or as disqualifying a Witness (x).

If a Defendant positively, plainly, and precisely, denies an assertion in the Bill, and one Witness only proves it as positively, clearly, and precisely, as it is denied, no decree for Relief can be made (y). But if there is any corroborative circumstance attaching more credit to the Evidence of the Witness, and over-balancing the credit due to the denial, as a positive 444*] denial, by the Defendant, a Court of Equity *will act upon the Testimony of one Witness (z). And where the Court, from circumstances, attaches more credit to the Testimony of the Witnesses than to the denial of the Defendant, the Court, it seems, will, if the Defendant is bold enough to require it, direct an Issue, and order that the Defendant be examined (a), or that the Defendant's Answer be read at Law, not as Evidence, for that could not be, but so as the Defendant might have the benefit of his Oath at Law, if it would weigh any thing with the Jury (b.) Where, however, the Plaintiff examines only one Witness to establish a Fact denied by the Answer, the Court will lay stress upon the Evidence so far as it serves to explain any collateral circumstance (c).

If a piece of Evidence before it is produced must be stamped, it may be stamped during the hearing of the Cause (d), or the Cause will be allowed to stand over for that purpose (e). It seems questionable, whether, if a stamped original be lost a Copy can be stamped (f).

445*] A Cause has been allowed to stand over to procure *an Administration, but not for the purpose of enrolling a Memorial (g).

It is too late at the hearing of the Cause to object to Depo-

(u) Coke v. Fountain, 1 Vern. 413.

(x) See Lloyd v. Passingham, 16 Ves. 64, 69.

(y) Wakelin v. Walthall, 2 Ch. Ca. 8. Alam v. Jourdan, 1 Vern. 161; and see Le Neve v. Le Neve, 3 Atk. 649, 3 Atk. 270.

(z) See Walton v. Hobbs, 3 Atk. 19; and see Sir Thomas Janson v. Kaney, 2 Atk. 140. Evans v. Bicknell, 6 Ves. 184, and Piling v. Armistage, 12 Ves. 80. East India Company v. Donald, 9 Ves. 282, &c. Mortimer v. Orchard, 2 Ves. jun. 244. Biddulph v. Keefe, 2 Sch. & Lefr. 532. Morphet v. Jones, 1 Swanst. 172.

(a) See East India Company v.

Donald, 9 Ves. 284. S. MS. Pember v. Mathers, 1 Bro. C. C. 52.

(b) Only v. Walker, 3 Atk. 408. Glyn v. Bank of England, 1 Ves. 42. Ibbetson v. Rhodes, 2 Vern. 554.

(c) Anon. 3 Atk. 270.

(d) Ford v. Compton, 3 Bro. C. C. 32. Davidson v. Foley, 3 Bro. C. C. 604. Cowles v. Trecothick 9 Ves. 252. S. C. 1 Smith, 233.

(e) Huddleston v. Briscoe, 11 Ves. 593, 595.

(f) See Ford v. Compton, 2 Bro. C. C. 32.

(g) Davidson v. Foley, 4 Bro. C. C. 604.

sitions taken *de bene esse* as irregular ; in such case the Court ought to have been moved to discharge the Order of Publication (h).

Declarations of a Party to a Deed previous to the execution are admissible in support of the Deed against imputations of Fraud ; but declarations subsequent to the Deed, impeaching the same, are inadmissible (i).

If a Person has not been heard of for *twenty-three* years (k), or even *fourteen* (l), he will be taken to be dead ; but *five* or *six* years, it seems, would not be sufficient to raise the presumption (m).

An Annuity not claimed for a great length of time will be presumed to be satisfied (n).

Where a Party had not been heard of for twenty years, payment has been ordered, upon Security given to refund, in the event of a claim (o).

In the Case of Witnesses called to impeach Wills they have attested, *Lord Mansfield* said he would hear, but give no credit to them, and *Lord Kenyon* followed him in that ! *Lord Eldon* took a middle course, and admitted such Witnesses to be heard, and their credit duly examined, but with all that jealousy attaching to a Man who upon his Oath asserts that *to be false [*446 which he has by his solemn act attested as true (o).

It is said that when a Man is charged only by an Oath, or a Book, the same Evidence will be allowed in his discharge (p) ; and in a recent Case at Law it was held that the whole of a *Declaration* by a Person must be taken together ; if he admits a charge and states a discharge, the whole admission must be taken together (q). It is different, however, as to an *Answer* which may be used to charge the Defendant, but not to discharge him (r). The Case of *Howard and Brown* was the first case where, because a Man had charged himself by *Answer*, his *Answer* was allowed as a good discharge ; and the Court said *it ought to be the last* (s) ; and accordingly in subsequent Cases (t) it was decided, that a Party who charges himself by his *Answer*, cannot read it in his discharge ; the Rule in Equity, being, that

(h) Dean and Chapter of Ely v. Warren, 2 Atk. 189.

(i) Conolly v. Lord Howe, 5 Ves. 700.

(k) Webster v. Birchmore, 13 Ves. 362.

(l) Lee v. Willock, 6 Ves. 605.

(m) 13 Ves. 362.

(n) Smallman v. Lord Arch. Hamilton, 2 Atk. 71.

(o) Bailey v. Hammond, 7 Ves. 590.

(p) Howard v. Braithwaite, 1 Ves. & Beams, p. 208.

(q) Darston v. Earl of Oxford, 1 Eq. Abr. 10, Bayley v. Hill, *ibid*.

Carter v. Lord Colerain. Barn. 126
Talbot v. Rutledge, stated 4 Bro. C. C. 74.

(q) Randle v. Blackburn, 5 Taunt. 246 : and see *Trials per pais*, 2 vol. 363.

(r) See Talbot v. Rutledge, stated in Blount v. Burrow, 4 Bro. C. C. 174, 75.

(s) 2 Vern. 194.

(t) Pateriche v. Powlet, 2 Atk. 283 ; and see Gilb. Evid. 62. Boardman v. Jackson, 2 Ball & Bea. 382. Thompson v. Lameb, 7 Ves. 404.

what a Defendant admits by his Answer, the Plaintiff need not prove; but if the Defendant insists by way of avoidance on any distinct Fact, he must by Evidence prove that Fact in his Defence. Where, however, an Answer in another Cause is resorted to as Evidence, the whole of it becomes admissible; and so as to any other document made Evidence in the Cause; and the Rule of the Court before stated, as to the Defendant's* 447*] discharge by his Answer, does not in such case apply (u).

Where an Account is of twenty years standing, the Defendant may prove on Oath what he cannot prove by his Books and cancelled Bonds (x). So an Account of fourteen years standing may be proved by Oath (y).

A Plaintiff will not be allowed to charge any thing upon his Oath (z); but a Defendant may discharge himself upon his Oath in respect of Sums under forty shillings (a), so as the whole is not more than 100*l*. (an unreasonable Rule, it has been called) (b); but he must in his Affidavit swear positively (c), and mention unto whom paid, for what, and when (d).

As to Evidence before the Master and on Appeals, we shall afterwards observe.

The Evidence of a *Prochein Amy* cannot be read, as he is liable to Costs (e). Nor can the Deposition of the Wife of a *Prochein Amy* be read, the Husband being liable to Costs (f).

A *Trustee*, though he has the legal Estate, is considered as having no Interest at all in this Court, and is examined by orders every day (g); but a Person *who is *Executor* in Trust, or *Administrator* in Trust, has been determined not to be capable of being examined.

An *Administrator, durante minore aetate*, is, in general, a competent Witness after the Administration is determined (h).

Where a Person has an Interest, it is not sufficient for him that he has been satisfied; he must produce a Release, or his Evidence cannot be read (i).

Parishioners are not good Evidence to prove a Charity given to the Parish; it is otherwise as to a Lodger, and one that does not pay to the Poor; but a Witness, described as of the Parish,

(u) Boardman v. Jackson, 2 Ball & Bea. 336.

(x) Peyton v. Green, 1 Ch. Rep. 146. S. C. 1 Eq. Abr. 11.

(y) 1 Ch. Ca. 127. S. C. 1 Eq. Abr. 11.

(z) Marshfield v. Weston, 2 Vern. 176; and see 2 Eq. Abr. p. 8, in m.a.g. note b.

(a) 2 Chan. Ca. 249. S. C. 1 Eq. Abr. 11. 2 Vern. 176, 2 Freem. 136.

(b) Whichey v. Whichey, 1 Vern. 470.

(c) Robinson v. Cumming, 2 Atk. 410.

(d) Anon. 1 Vern. 283.

(e) Head v. Head, 3 Atk. 511.

(f) S. C. 3 Atk. 547.

(g) Croft v. Pyke, 3 P. Wms. 181. Mabank v. Metcalf, 3 Atk. 75. Fotherby v. Pate, 3 Atk. 604; and see Bellew v. Russels, 1 Ball and Beatty, 99, and case there mentioned. Floyd v. Powis, mentioned in Mulvaney v. Dillon, 1 Ball and Beatty, 413, and the principal Case.

(h) 3 Atk. 604.

(i) Anon. 2 Atk. 14.

will be supposed to be a Housekeeper, and to pay to the Poor, unless the contrary is proved (*m*).

Formerly, on a Bill by Assignees, they must (unless it was admitted by the Answer) prove the Party was a Bankrupt—the Petitioning Creditors Debt, and the Act of Bankruptcy, as was formerly necessary in an Action at Law; and in a Case where this proof was wanting, and no admission by the Answer, the Bill was dismissed with Costs (*n*); but now such proof is unnecessary (*o*).

A Copy of a Register of Baptism in the Island of Guernsey is not sufficient Evidence here of a Party being of Age (*p*).

The Wife's Answer does not bind her Husband (*q*).

A Copy of a Letter may be read in Evidence without Notice to produce the Original, where the *Depositions have [*449 given sufficient Notice that the Copy was intended to be relied upon in Evidence (*r*).

Though Evidence be taken in the Cause, the Party need not read it, if he thinks proper, on the Hearing (*s*).

Setting down the Cause.

A Rule to pass Publication having expired, the Cause may be set down to be heard the next Term after Publication passes; and if the Plaintiff neglects it, the Defendant may the Term after, set down the Cause, in order to recover his Costs (*t*); and if it be an Injunction Cause, the Defendant may set down the same the Term after Publication (*u*). If Publication has been enlarged at the instance of the Defendant, upon terms of not hindering the Plaintiff from setting down the Cause, the same may be set down before Publication has passed (*x*); but, in general, a Cause cannot be set down to be heard in the same Term in which the Rule to pass Publication is given, unless by the consent of all Parties (*y*).

It is in the discretion of the Court to direct a Cause to be advanced (*z*), as, where the approaching death of a Party, or other circumstances, render it necessary (*a*). So, where an Annuity claimed by the *Bill was all the subsistence the [*450 Plaintiff had for herself and nine Children, the Cause was ordered to be advanced (*a*). And where a term of years, the subject matter of a Bill for a specific performance, would expire

(*m*) Attorney-General v. Wyburgh, 1 P. Wms. 599.

(*n*) Anon. MS. 17th July 1804.

(*o*) Vid. 49. Geo. 3. c. 121. s. 11.

(*p*) Huet v. Le Measurer, 1 Cox, 378.

(*q*) Anon. 2 Chan. Cas. 39.

(*r*) Wood v. Strickland, 2 Meriv. 461.

(*s*) Day v. Newman, 2 Cox, 80.

(*t*) See Countess of Gainsborough v. Giffard, 2 P. Wms. 424.

(*u*) Vid. Har. Ch. Pr. Newl. Ed. p. 302.

(*x*) Yate v. Bolland, 1 Dick. 493.

(*y*) 1 Turn & Ven. 92, in note†.

(*z*) Hoyle v. Livesey, 1 Meriv. 382.

(*a*) Strathmore v. Bowes, 24th July 1804. MS.; and see Roberts v. Hartley, 1 Ves. jun. 56.

(*a*) White v. —, 1805, MS.

before the Cause could be heard in its regular course, the Cause was ordered to be advanced (b). So, where a Cause was set down to obtain a Decree *pro confesso*, it was, on Motion, advanced (c).

Subpœna to hear Judgment.

WHEN the Cause is set down, the next step is to obtain a *Subpœna to hear Judgment*, which is always made returnable three days before the day on which the Cause is to be heard, exclusive of a Sunday, and is served as other *Subpœnas* are. If the Defendants live in Town, or within twenty miles, they must be served *ten* days at least before the time mentioned in the Writ to hear Judgment, except it be in the Vacation between Easter and Trinity Terms, in which case, *eight* days are sufficient. If the Defendants reside above twenty miles from London, the Service must be *fourteen* days before the time to hear Judgment, except in the before-mentioned Vacation, and then *ten* days only (d).

If the Defendant dies after the Service of the *Subpœna* to hear Judgment, it has been matter of doubt whether upon a Bill of Revivor a new *Subpœna* to hear Judgment is necessary (e); the Court inclined to think it was not.

451*] *When a Plaintiff seeks relief not merely against a Husband, seized or entitled in right of his Wife, but against the separate Estate of the Wife, she must be served with a *Subpœna* to hear Judgment (f).

Where an Infant is Defendant, the Service of the *Subpœna* to hear Judgment must be on the Guardian, and not on the Infant (g).

If the Clerk in Court of the Defendant cannot be found, the Court, on a Motion for that purpose, will permit the *Subpœna* to hear Judgment to be served on the Person who acted as Solicitor for one of the Defendants; serving also, a Copy of the Order, with some Person in the House which was the Defendant's last place of abode (h); and substitution of the Service of the *Subpœna* to hear Judgment has been allowed, on an Affidavit that the Defendant had absconded (i).

If the Plaintiff sets down a Cause, and does not serve the Defendant with a *Subpœna* to hear Judgment, but he attends, and the Plaintiff does not proceed in having the Cause heard, the same is struck out of the Paper, and no Costs are given on either side; but if the Plaintiff serves the Defendant with a *Subpœna*

(b) *Hoyle v. Livesey*, 1 Meriv. 381.

(c) *Hart v. Ashton*, 1 Madd. Rep. 643.

175.

(d) 1 Turn. & Ven. 94.

(e) *Byne v. Potter*, 5 Ves. 305.

(f) *Jones v. Harrie*, 9 Ves. 486.

(g) *Taylor v. Atwood*, 2 P. Wms.

643.

(h) *Anon.* 1 Ves. 23.

(i) *Anon.* before Vice Chancellor Plumer, 15 Jan. 1816, MS.

to hear Judgment, and the Defendant makes and files an Affidavit of such Service, and the Cause is in the Paper, and the Plaintiff's Counsel does not open the Bill, in such case, upon reading the Defendant's* Affidavit of the Service, the Court [*452 will dismiss the Plaintiff's Bill, with Costs, to be taxed (i).

So, if the Cause is set down at the Defendant's instance, and the Plaintiff does not appear, the Defendant cannot take advantage of his absence, unless he has served a Subpœna, to hear Judgment on the Plaintiff; but if it be served, and an Affidavit of such Service is shown, the Bill will be dismissed with costs (k). Where a Defendant does not appear at the hearing of the Cause, and on the usual Affidavit a Decree nisi is obtained, and it is afterwards moved to set down the Cause again, the Court will direct a particular day on which it is to be heard (l).

Where a Plaintiff had undertaken to speed his Cause, and obtained an Order to withdraw his Replication, and set down the Cause upon the Bill and Answer, but did not serve a Subpœna to her Judgment, or appear when the Cause was called on, it was held, that the undertaking of the Plaintiff was equivalent to serving the Subpœna to her Judgment, and that the Defendant was entitled to have the Bill dismissed with Costs (m).

Decree.

A DECREE cannot be made upon an interlocutory Order, unless with Consent (n).

A Decree may be made between Co-Defendants, when it is grounded on Evidence between Plaintiffs *and Defend- [*453 ants (o); the Defendant chargeable has a right to insist that he shall not be liable to be made a Defendant in another Suit for the same matter that may be then decided between him and his Co-Defendant. And the Co-Defendant may insist that he shall not be obliged to institute another Suit for a matter that may be then adjusted between the Defendants; and if a Court of Equity refused so decree, it would be a good cause of Appeal by either Defendant (p).

Immediately, or some time after the hearing of the Cause, the Decree or Order of the Court is made upon the matters in question, and Minutes of it are taken down by the Register. The Minutes are afterwards fully drawn out by the Register.

(i) Har. Ch. Pract. Newl. Edit. p. 306.

(k) Ibid.

(l) Margravine of Aaspach v. Noel, 1 Madd. Rep. 313.

(m) Rogers v. Gore, 17 Ves. 130. Vol. II.

(n) Allan v. Bower, 3 Bro. C. C. 153.

(o) Per Lord Redesdale, in Chamley v. Lord Dunsany, in Dom. Proc. 2 Sch. & Lefr. 710. App.

(p) Per Lord Eldon, ibid. p. 718.

If any mistakes appear, and the Register cannot consistently with his duty make the alteration required, an application, by Motion or Petition, may be made to the Court, to rectify the *Minutes* (q). The Decree is afterwards passed and entered. By an Order, all Decrees and Dismissions of Bills on a Hearing must be drawn up, signed, and enrolled before the first day of the next Michaelmas or Easter Term after the same is pronounced, unless leave of the Court be obtained, as it may, by Motion or Petition, as of course, to enter the Decree, *unc pro tunc* (r).

454*] In the Court of *Exchequer*, the Plaintiff is allowed *one entire Term, and the Vacation after such term, for preparing his Decree; and if it is not then prepared, the Defendant is at liberty to move in the next Term to have it Drawn up (s).

A Decree drawn up, passed and entered, cannot on further Directions, or by Petition (t), or by another Bill (u), or in any way, be reversed, altered, or explained, except on a *Rehearing*; and if the Decree is signed and enrolled a *Bill of Review* is necessary (x); and where a decree by default has been made absolute, the proper course to set it aside is not by a Motion to discharge the Order made for making absolute the Decree, but to present a Petition for a *Rehearing* (y).

It never was usual, and it is now very uncommon, to express in the Decree the reasons upon which it is founded (z). In extraordinary cases it is sometimes done.

Where there is Evidence adduced in the Cause it is not enough that the Decree says, "on reading the Proofs" it is decreed, &c.; but it should be, "on reading the Proofs it appeared thus and thus, and therefore decreed" (a).

The Decree is either *Interlocutory* or *Final*.

455*] Where references to the Master are necessary to *ascertain facts, upon which the Decree must be founded, as in cases of Account, or on questions of Title (b), the Decree is always interlocutory. It is so, also, where the Court thinks proper to direct an Issue, or a Case upon which we shall presently observe; a final Decree being afterwards made.

No Person but Parties in the Cause can be affected by the Decree; and where the Decree is against the Principal, the Plaintiff must proceed at Law to recover the Possession, if he

(q) As to this Motion, see post.

(r) *Smith v. Clay*, 3 Bro. C. C. 642, 643, Newl. Har. 322.

(s) *Calvert v. Dignum*, 4 Price, 133.

(t) *Taylor v. Popham*, 15 Ves. 76.

(u) *Earl of Darlington v. Pulteney*, 3 Ves. 386.

(x) *Ibid.* and 1 Ves. 93, there cited.

(y) *Attorney-General v. Brooke*, 3 Meriv. 698. S. C. afterwards on Re-

hearing, 18 Ves. 319, where the ground upon which the application to discharge the Order to making the Decree absolute is not correctly stated. See 3 Meriv. 699, in note.

(z) Ex parte the Earl of Ilchester, 7 Ves. 373.

(a) *Broad v. Broad*, 2 Chan. Cas. 161; and see *Bonham v. Newcombe*, *ibid.* p. 159. *Sed quæ.*

(b) See 6 Ves. 323.

has not made all the Persons deriving an Interest in the Lands, Parties to the Suit, unless the Interest was acquired pending the Cause (c).

Upon a Decree, taken by *default* of the *Defendant* at the Hearing, the Evidence is not entered as read (d).

Where *subsequent Interest* is directed to be computed, it is the course, in the case of a *Mortgage*, to compute Interest on the Principal and Interest reported due (e), but in cases of *Bonds* or *Legacies*, to compute it on the Principal only (f).

A Trustee not appearing at the hearing of the Cause, a Decree was made against him, with liberty to show Cause against it. Under this Order he set down the Cause again, and prayed his Costs, which were given him on paying the Costs of the day on the former Hearing (g).

*When a day is thus given to show Cause, and the Defendant sets down the Cause, it will, on Motion, be put at the head of the Paper of Causes (h).

Formerly, in Decrees to account before a Master, there was a clause in them, that if there should be any special Matter in taking the Account, the Master might state it specially, but Decrees are now drawn up without this clause, and a Master may state special Matter notwithstanding (i).

Generally, no Interest can be allowed where it is not ordered or reserved by the Decree. After a direction of a Trial at Law, a reservation of general directions will be taken to include Costs, Interest, and every thing; but in the common case of reference to a Master, it is taken to be otherwise; and the reason appears to be, that the question of Interest should be pointed out to the Master, that he may have notice, and attention to that matter so reserved, that his Report may be adapted to it (k); but there is, it seems, a discretionary power in the Court to allow Interest upon special circumstances, as where the demand in its nature carries Interest, as a Bond, &c. or where it appears that the Administrator has made Interest of his Intestate's Effects whilst the Suit has been depending (l).

The Decree in most cases reserves all further directions till after the Master's Report, and by such reservation the Court can give any subsequent relief incidental to the Plaintiff's Case (m).

*Where the Court have, at the hearing of the Cause, [*457 reserved any of the matters in question between the Parties till

(c) *Dunne v. Farrel*, 1 Ball & Beatty, p. 124.

(d) *Stubbs v. —*, 10 Ves. 30.

(e) *Butler v. Duncombe*, 1 P. Wms. 453. *Bacon v. Clerk*, *ibid.* 480. *Brown v. Barkham*, *ibid.* 652.

(f) *Perkyns v. Baynton*, 1 Bro. C. C. 574.

(g) *Norris v. Norris*, 1 Cox, 183.

(h) *Margravine of Anspach, v. Noel*, 1 Madd. Rep. 313.

(i) *Anon.* 2 Atk. 621.

(k) *See Champ v. Mood*, 2 Ves. 470.

(l) *Ryves v. Coleman*, 2 Atk. 440.

(m) *Dormer v. Fortescue*, 2 Atk. 284.

after the Master has made his Report, the Court will not determine those matters in a summary way upon Motion, (unless where the Motion is for a Receiver,) but the Plaintiff must set it down in the ordinary way upon the Equity reserved (n).

If a Vendee files a Bill for a specific performance, the Court will, by its Decree, refer it to the Master to appoint a short day for the Payment of the Money, and to compute Interest till that time; and if upon a tender of a sufficient Conveyance, the Principal Money and Interest should not then be paid, the Plaintiff's Bill to be dismissed (*quoad hoc*) with Costs (o).

It is the constant practice of the Court in Decrees against a Mortgagee upon a Bill for Redemption, or against an Executor to account, to direct it *without future words*, viz. to account for what they have or might have received, if it had not been for their own *default*; and yet if the Person decreed to account receive any thing subsequent to the Decree, it is inquirable of before the Master, and the Defendants in each case must bring such Sums so received to account (p). On a Decree to account against a Trustee or Executor, the words are, "what they have received, or what without wilful default might have been received," as in a Decree against a Mortgagee (q).

458*] It is a Rule, that if the Plaintiff is entitled to *Relief against both Defendants, and one ought to indemnify the other Defendant, who is decreed to pay to the Plaintiff, the Court will give liberty to that Defendant to prosecute the Decree against the other. As where a Surety pays Money, the Principal must indemnify the Surety, and the Court will make a Decree over (r).

In the case of an Executor committing a *Devastavit*, and a Decree for Payment of the Amount, the Debt is considered as due from the time of the *Devastavit*, and not from the date of the Decree; and therefore, where a Person was committed under an Attachment for breach of a Writ of Execution of a Decree for Payment of Money on account of a *Devastavit*, it was held that as he had, between the time of the *Devastavit* and the date of the Decree, taken the benefit of the Insolvent Debtors Act, and had been ordered to be discharged by the Court of Quarter Sessions, he might be brought up on a *Habeas Corpus* before the Chancellor, and discharged (s).

The cases where a Bill is *retained* that there may be a Trial at Law, are where it is necessary to establish the right at Law in order to found the equitable relief (t).

It is not a necessary consequence that the Court will not ul-

(n) Cooke v. Gwyn, 3 Atk. 690.

(r) Walder v. Preswick, 2 Ves.

(o) Lowther v. Andover, 1 Bro. C. 622.

C. 398.

(s) Wheldale v. Wheldale, 16 Ves.

(p) Anon. MS.

376.

(q) Bulstrode v. Bradley, 3 Atk.

(t) Watson v. Low, 6 Ves. 151.

timately determine against the Plaintiffs in Equity, because the Bill has been retained. The Bill, it seems, may afterwards be dismissed (u).

*After a Decree directing Inquiries, the Parties may by [*459 consent obtain an order to dismiss the Bill with Costs, as such an Order could be made upon further directions (x).

After a Decree a Bill cannot be dismissed, except upon a Re-hearing or Appeal; but if Parties are desirous of an arrangement for the disposing of the Fund in Court, that may be accomplished by consent on further directions (y).

In a Case where the original Decree was lost, but had been acted upon by Reports, and recited in an Order on further directions, it was, on Motion, ordered to be drawn up from an Office-copy, and entered *nunc pro tunc* (z).

If the Defendant has *appeared* to the Suit, and is afterwards in Contempt, a Decree, it seems, may be taken *pro confesso*, and the Plaintiff in such case takes "such Decree as he can abide by," and himself draws up the Decree; but if the Defendant *has not appeared*, then, in pursuance of the Statute (a), the Court hears the Pleadings, and itself pronounces the Decree, and does not permit the Party to draw up his own Decree (b).

Where a Defendant for want of putting in his Answer, has stood out the whole Process of Contempt to a Sequestration, and the Bill taken *pro confesso*, on a Decree against him *ad computandum*, the Court will not discharge the Sequestration on paying the *Costs of the Contempt only, but will keep it [*460 on foot as a Security to the Plaintiff for the Defendant's appearing before the Master to take the Account (c).

Where a Bill is amended after an Answer, if the amended Bill is not answered (d), or is insufficiently answered (e), the Plaintiff is entitled to a Decree, that the Bill be taken *pro confesso*, generally.

The Interests of Infants is so far regarded that no Decree can be made against an Infant without having a day given to show cause after he comes of age; and he is served with a Subpoena to show cause within six months after coming of Age why the Decree should not be made absolute; and it is made absolute without entering an appearance if he does not appear (f). Where there is a Decree *nisi Causa* against an Infant,

(u) See *Harmood v. Oglander*, 6 Ves. 225, and *Curtis v. Curtis*, 2 Bro. C. C. 629; but see *Duke of Leeds v. Lord Radnor*, *ibid.* p. 519. 565. See on this subject *Carew v. Johnstone*, 2 Sch. & Lefr. 300.

(x) *Anonymous*, 11 Ves. 169.

(y) *Lashley v. Hogg*, 11 Ves. 602.

(z) *Donne v. Lewis*, 11 Ves. 601.

(a) 5 Geo. 2, c. 25.

(b) *Geary v. Sheridan*, 8 Ves. 192; and see *Ogilvie v. Hearne*, 13 Ves.

(c) *Maynard v. Pomfret*, 3 Atk. 468.

(d) *Toplin v. Stuart*, 4 Ves. 619.

(e) *Turner v. Turner*, *cit.* 4 Ves. 519, in note.

(f) *Wharam v. Broughton*, 1 Ves. 183. *Savage v. Carrol*, 1 Ball & Beatty, 651.

he may, upon coming of Age, and before the Decree is made absolute, put in another Answer (the Answer of his Guardian not being binding upon him) (*g*), make a Defence, and examine Witnesses anew (*h*). But if an Infant conceives himself aggrieved by a Decree, he is not under a necessity to stay till he comes of Age before he seeks redress, but may apply for that purpose as soon as he thinks fit; neither is he bound to proceed by way of Rehearing, or Bill of Review, but may impeach the former Decree by an original Bill (*i*).

461*] *An *Infant Plaintiff* is, it seems, (unless under extraordinary circumstances) (*k*), as much bound, and as little privileged, as one of full Age (*l*); but the Court will take care that the Infant does not make any injurious submission by his Bill, and will, if necessary, when the Cause is brought on, allow him to amend his Bill, on paying the Costs of the Day (*m*). There are, however, Cases in which an Infant has been allowed to show cause when he came of Age against a Decree in his own Cause respecting *real Estate* (*n*); but was held to be bound by a Decree in a Cause regarding *Personal Estate* where he was Plaintiff, as much as a Person of full Age; since it would be most mischievous with regard to personal Estate, if an Infant, after being of Age, was allowed by a new Bill to dispute any thing done during his Minority, as to *Maintenance, Education* (*o*), &c.

Where Lands are devised to Trustees, to be sold for Payment of Debts, and the Heir at Law is an Infant, he has no day given him to *show cause on his coming of Age*, for nothing descends to the Heir (*p*); but it is otherwise where there is no Devise of Lands expressly to any *particular Person* (*q*).

462*] *Lord Keeper North* appears to have held, that a *Debt by Decree, should be paid after a Judgment, but before Debts by Bond (*r*); and there was, for a considerable time, a struggle in this Court, before it was decided that its Decrees were *equal* to Judgments at Law; but that was determined in *Nanney v. Martin*, 14 Car. 2, (1 Chan. Cas. 27,) and afterwards by *Lord Jefferies* (*s*), and was completely settled about the time of

(*g*) *Fountaine v. Caine and Jeffs*, 1 P. Wms. 503.

(*h*) *Napier v. Lady Effingham*, 2 P. Wms. 401.

(*i*) *Richmond v. Tayleur*, 1 P. Wms. 734. *Carew v. Johnstone*, 2 Sch. & Lefr. 292.

(*k*) See *Bennet v. Lee*, 2 Atk. 530.

(*l*) *Lord Brook v. Lord Hertford*, 2 P. Wms. 519. *Gregory v. Molesworth*, 3 Atk. 626. *Windham v. Windham*, 2 Freem. 127.

(*m*) *Serie v. St. Eloy*, 2 P. Wms. 367.

(*n*) *Lady Effingham v. Sir John Napier*, 2 P. Wms. 401, mentioned 3 Atk. 627.

(*o*) *Gregory v. Molesworth*, 3 Atk. 626.

(*p*) *Cook v. Parsons*, 2 Vern. 429. S. C. Pre. in Ch 184; but see note 2, to Report in Vern.

(*q*) *Blatch v. Wilder*, 1 Atk. 421; and see *Uvedale v. Uvedale*, 3 Atk. 213; and see *Booth v. Rich*, 1 Vern. 295.

(*r*) *Harding v. Edge*, 1 Vern. 143.

(*s*) *Searle v. Lane*, 2 Vern. 89.

Morrice v. The Bank of England (t). It is, however, only equal to a Judgment at Law, so far as it concerns the *personal Estate* of the Party against whom a Decree is made; for a Decree does not, like a Judgment, affect the *real Estate* (u), unless in the course of Administration (x). If, therefore, there be a Decree for a Debt, and the Defendant dies, leaving no personal Estate, but a considerable real Estate in Fee, the latter would not be affected by the Decree in the hands of the Heir, as it would in the Case of a Judgment (y); unless where it falls within the Provisions of the late Act (47 Geo. 3, sess. 2, c. 74). But though a *Decree, unlike a Judgment at Law, does [*463 not affect the *real Estate*, yet it has, in other respects, a superiority. For, upon a *sequestration*, by which Courts of Equity enforce their Decrees, the *Goods* of the Party may be sequestered, although the Party is in custody upon an *Attachment* for a *Contempt* in not performing the Decree; whereas, at Law, if a *capias ad satisfaciendum* is executed, no *fiery facias* can issue (z). There are, however, Cases where even Decrees have been held to bind Land, as where a Decree is to hold and enjoy over; the Interest under such Decree being taken to be similar to an Estate by *Elegit* (a). A mere Decree for an *Account* of the Demand of the Plaintiff, and of the personal Estate come to the hands of the Defendant, with a direction for payment out of the result of that account, is not a Decree to prevent the Executor's confessing, or paying, a Judgment (b). There must be a *Report* and a final *Decree* to make it equal to a Judgment (c).

If an Executor pays under a Decree, and afterwards a Creditor upon a Judgment subsequent to the Decree, sues at Law, the Court will enjoin him (d).

It is an established rule not to set aside a Decree, merely be-

(t) For. 218, and S. C. on Appeal in House of Lords, 4 Bro. P. C. 287, a Case, Lord Eldon observes, "remarkably well reported." In this Case the Decree was *before* the Judgment; that appears by the Case in the House of Lords though not in Forrester. See on this subject 3 P. Wms. 401, in note F. and Perry v. Philips, 10 Ves. 37, and Gray v. Chiswell, 9 Ves. 125.

(u) 2 P. Wms. 621. In the Case of Howard v. Suffolk, Chan. Rep. 192, the Court declared "that by the Laws, Rights, and Course of Justice in England, a Decree, notwithstanding any Contempt thereof, doth not charge or bind (the Parties) Goods and Moveables, but his Person only; nor

could they be attached or seized by the Decree; and discharged the Arrest and Seizure; and the Court ordered its Judgment to be put into Latin, and exemplified under the Great Seal of England."

(x) 1 Ves. 497.

(y) Bligh v. Earl Darnley 2 P. Wms. 621. *Sed vid.* Connor v. Browne. 1 Ridgw. P. C. 139.

(z) Morris v. Bank of England, For. 222.

(a) Ibid.

(b) For. 217. Smith v. Hoskins, 2 Atk. 386.

(c) Ibid. Perry v. Philips, 10 Ves. 41.

(d) Morris v. Bank of England, For. 218.

cause obtained by the consent of Counsel on both sides. If collusion could be proved it would be different (e).

464*] *When the Chancellor himself first makes a Decree, it is properly the Declaration of his judgment, and is not a perfect and complete Decree before the *Enrolment*; for till that time he may *re-hear, alter, change, or reverse* it; it is not his final absolute Judgment until *enrolled* (f).

Enrolment, is the ingrossing of the Decree on Parchment, and leaving it with the proper Officer. The signing and enrolling of Decrees with expedition is not encouraged, because, if there is a small mistake in the Decree it occasions the expense of an Appeal to the Lords, or a Bill of Review. This applies particularly in cases of Account; for often, in the course of the Account, some particular direction, necessary to do justice, has been found out, which could not appear before, upon which liberty has been granted to re-hear, which, if the Decree was signed and enrolled, could not be done (g). Decrees to Account, therefore, are seldom signed and enrolled (h). The inconvenience of the quick signing of Decrees is the reason of giving liberty to the Party to enter a *Caveat*, without giving any reason for it, which will prevent the enrolling for a month (i), or twenty-eight days from the time of presenting the Decree to the Lord Chancellor to be enrolled, and Notice given by the Lord Chancellor's Secretary to the Clerk on the other side (k).

465*] A Decree may be enrolled by the Plaintiff or *Defendant (l), and after an *Abatement* (m); the death of a Party, for instance (n).

A Decree may be enrolled without special Order, though more than a year has elapsed since it was pronounced (o). Motions have been allowed to amend the *Enrolment* (p).

After the Decree has been enrolled, applications have in some instances been made to *vacate the Enrolment*. In a Case before *Lord Hardwicke*, after noticing some *Precedents* relating to this subject, he thus expresses himself: "Both these *Precedents*, therefore, prove it to be *discretionary* in the Court (I do not mean arbitrarily) to exercise this power if they think fit" (q); and if the *Enrolment* was gained by surprise or irregularity it will be opened (r).

(e) *Harrison v. Rumsey*, 2 Ves. 488. *Smith v. Turner*, 1 Vern. 274.

(f) *Legal Jud. &c.* p. 248.

(g) *Anon.* 1 Ves. 326.

(h) *Staunton v. Oldham*, 2 Atk. 383.

(i) 1 Ves. 326.

(k) *Burnet v. Theobald*, 1 P. Wms. 609.

(l) *Gartside v. Isherwood*, 2 Dick. 612.

(m) *Duchess of Bucks v. Sheffield* Amb. 586.

(n) *Anon.* 2 Ch. Cas. 277. Nels. 169.

(o) *Tisdall v. Lady Charleville*, 2 Sch. & Lefr. 392.

(p) *Eyles v. Ward*, Mos. 255. S. C. 1 Dick. p. 58; and see *Yow v. Townshend*, ib. 59.

(q) 1 Ves. 207. *Kemp v. Squire*.
(r) *Anon.* 1 Vern. 135.

Where error appears in the body of the Decree, the Court will open the Decree (*s*); and if the Enrolment was gained by surprise, or irregularity, it will be opened (*t*).

Accordingly, when the Defendant was in a *bad state of Mind*, and the Merits of the case had not been entered into, the House of Lords ordered the Enrolment to be set aside, and that the Decree should be opened, and an opportunity given to bring on the Cause in a proper manner (*u*).

*So, where owing to the Negligence of the Solicitor the [*466 Bill had been dismissed, the Court opened the Enrolment (*x*).

In a subsequent Case (*y*) *Lord Loughborough* refused to open the Enrolment, though it seems the Bill was dismissed owing to the negligence of the Solicitor; but when the Cause came on again upon a fresh Bill, *Lord Eldon* appears to have doubted whether the Decision in that respect was correct (*z*).

A Motion to open the Enrolment of a Decree, and stay proceedings under it, to give an opportunity of Appeal, will not be granted, if the Decree has been made upon the Merits (*a*).

When the Decree is signed and enrolled the Plaintiff is entitled to issue a *Writ of Execution*, with which the Defendant is in general personally served; but Service on the Clerk in Court is, on Motion, sometimes substituted; as where the Defendant conceals himself (*b*).

It is not, however, usual to sue out a Writ of Execution, which is attended with difficulty and expense, it being previously necessary to enrol the Decree, but to obtain a short Order to do what is directed by the Decree within a given time, which has all the same effect, as an Attachment may be issued if the Order is not obeyed; and if the Defendant is taken upon the Attachment, it seems he must not only obey the Order, but pay the Costs *occasioned by disobeying the Decree, before he [*467 can be liberated (*c*).

If a Defendant attends the hearing of a Cause, and has Notice of the Decree by being present when it is propounded, if he does any act that is a contravention of the same he is guilty of a Contempt, and punishable for it, notwithstanding the Decretal Order is not drawn up; otherwise, it would be extremely easy to elude Decrees, some of which in their nature require a considerable length of time before they can be completely drawn up (*d*).

(*s*) *Grice v. Goodwin*, Prec. Chan. 260, 1.

(*t*) *Anon.* 1 Vern. 131.

(*u*) *Benson v. Vernon*, Nov. 1745, in the House of Lords; see 1 Vez. 206.

(*x*) *Robson v. Cranwell*, Dec. 8th 1731 (should be 18th) before Lord King, quoted 1 Vez. 206, and reported 1 Dick. 61. *Kemp v. Squire*, 1 Vez. 205.

(*y*) *Picket v. Loggan*, 5 Ves. 702.

(*z*) 14 Ves. 231.

(*a*) *Charman v. Charman*, 16 Ves. 115.

(*b*) 12 Ves. 203.

(*c*) See *Collins v. Crumpe*, 3 Madd. Rep. 390.

(*d*) *Ship v. Harwood*, 3 Atk. 565; and see 12 Ves. 202.

Where the Defendant had Notice of a Decree to which he was no Party, by being present when it was pronounced, and paid Money contrary to the Decree, it was ordered he should pay the same again (e).

If a Plaintiff obtains a Decree for Money, and the Plaintiff's Solicitor, unknown to the Plaintiff, and without his Order, receives the Money, the Payment is good, and the Solicitor must pay the Plaintiff (f).

If, after Service of the Writ of Execution of the Decree the Defendant refuses to perform it, the usual Process issues as in other Cases of Contempt.

A Decree was made to pay the Plaintiff 400*l*. Being examined on Process of Contempt for not paying the Money, the Defendant denied Service of Process upon her; upon which a Commission issued to *Plymouth*, where the Plaintiff lived, to prove the Contempt, and it was proved by one Witness. The 468*] Defendant afterwards prayed a Commission to examine* touching the Contempt, alleging that she was never served, but was sick in bed at the time when the Service was pretended to be made; and that her Sister going to the door when he that served the Process knocked, he served her instead of the Defendant, and the Chancellor granted the Motion (h).

If the Party goes to Prison in respect of his Contempt, and continues a considerable time in Custody, the Plaintiff may cause him to be brought back into Court by an *Habeas Corpus*, and admonished; and if he still persists in his contumacy, the Court may set a Fine upon him, and award Process out of the Petty-bag to the Sheriff, where his Estate lies, to levy and pay into the Hanaper, and may order him to be kept a close Prisoner (i).

If a Party refuses to perform a Decree, and an Attachment issues, and the return to the Attachment is, that the Party is in the Custody of the Warden of the Fleet, a Motion may be made for a Sequestration (k).

Commissioners on a *Commission of Rebellion* have it in their discretion to take Bail of a Person for not performing a Decree (l).

After a Decree against a Corporation for a Sum of Money, and a *distringas* issued out against them, the Court refused to give them any time, or let them be examined on Interrogatories; it is otherwise where it is a *distringas* on Mesne Process (m).

(e) *Harvey v. Montague*, 1 Vern. 57.

(f) *Anon.* 2 Chan. Cas. 38.

(h) *Hammond v. Shelly*, 2 Chan. Cas. 100.

(i) See Newl. Har. 333, and 4 Bro. C. C. 30, there cited.

(k) *Errington v. Ward*, 18 Ves. 314.

(l) *Inglet v. Vaughan*, 1 Ch. Rep. 261. S. C. 1 Dick. 7.

(m) *Harvey v. East India Company*, 2 Vern. 395. S. C. Pre. Ch. 129.

*If the Company have no Goods, it has been held that [*469 the Members, in their private Persons, are liable (n).

Where a Decree is that the Defendant shall deliver up an Estate, a Motion must be made that a Writ of Injunction should issue, enjoining the Defendant to deliver up Possession of the Estate, according to the Decree which was pronounced in the Cause. Upon this Order may be grounded the *Writ of Assistance* to be executed by the Sheriff in case of disobedience. This is not a very common proceeding, but it is the only mode of obtaining immediate Possession of Land when decreed (o).

The course of proceeding to be observed previous to an application for a *Writ of Assistance* appears to be, 1. Service of a Writ of Execution of the Decree; 2. An *Attachment* for disobedience of the Decree, founded on an Affidavit. This Attachment is not executed, but is merely the foundation of the next Process, viz. 3. An Order for an injunction to enjoin the Party to deliver Possession. 4. A Motion for a *Writ of Assistance* upon proof of Service of the Injunction, and its not having been complied with, and an Affidavit of the facts, which is a Motion of course (p).

The *Writ of Assistance* appears to have been first employed in the Reign of James the First (q); from that time, though in general parlance, it is said that *the Decree of the Court [*470 acts only in *personam*, yet if the Possession of Lands is decreed, and the Defendant refuses to perform the Decree, the Court directs this Writ to the Sheriff, in enforcement of its Decree (r); but the Court cannot to this day issue such a Writ as to Lands in the *Plantations*; but if the Party is in England, a Decree respecting Lands in the *Plantations* may be enforced by Process of Contempt, in *personam*, and *Sequestration*, which is the proper Jurisdiction of the Court (s).

An *Escape Warrant* lies by Statute (t), in respect of Persons escaping, who have been committed for a Contempt in not performing Orders or Decrees made in Courts of Equity, but does not extend, it seems, to Escapes of Persons committed for Contempts generally (u).

Where there is an Equitable demand, and the Party is taken in Execution on a Decree, the Court will, notwithstanding, issue all its Process by way of *Sequestration against his Lands and Effects*; and the Body being detained is not in this Court a satisfaction; the reason is, because he is detained for the Con-

(n) Dr. Salmon v. Hamburg Company, mentioned 2 Vern. 396.

(o) Huguenin v. Baseley, 15 Ves. 180.

(p) Dove v. Dove, 2 Dick. 618, &c. 8. C. 1 Bro. C. C. 375, and 1 Cox, 101; and see Stribley v. Hawkie, 3 Atk. 275, 276.

(q) Pen v. Lord Baltimore, 1 Ves. 454. 1 Cox, 101.

(r) Stribley v. Hawkie, 3 Atk. 275. Roberdeau v. Rous, 1 Atk. 543. Forster v. Vassal, 3 Atk. 587.

(s) 1 Ves. 454.

(t) 5 Anne, c. 9.

(u) Paine's Case, 1 P. Wms. 438. S. C. 1 Strappe, 99.

tempt ; but at Law the detaining the Body is a satisfaction, and you cannot afterwards take his Goods (x). But no Sequestration lies till the time for the return of the Attachment is out on which the Body was taken (y).

471*] *In the Court of *Exchequer*, Decrees are in like manner enforced by Sequestration, though *Chief Baron Hale* and *Baron Montague* could never be prevailed upon to grant it (z).

Sequestrations on *mesne Process* have before been noticed (a). Under a Sequestration for the non-performance of a Decree (b), the Sequestrators may take Possession of the real and personal Estate of the Party, and receive the Rents, Issues, and Profits of the same, until he has fully performed the Decree (c).

There is no instance of an order to sell, under a Sequestration, Property which passes by Title, and by delivery, for in such Case no Title can be made (d); but liberty to make a Lease has been granted (e) on a Sequestration upon Contempt for not paying Money into Court. Though Estates cannot for this reason be sold, yet the Courts direct the application of the Rents and Profits (f) and the Arrears thereof, and the Dividends of Money (g).

A Sequestration for non-performance of a Decree is said to fall to the ground by the death of either the Plaintiff or Defendant 472*] ant (h); which is not the *case of a Judgment at Law, an Extent upon which does not so abate; a proof this, that a Sequestration is only a personal Process (i). In one Case, however, where the Suit was revived after the Defendant's death, the Sequestration was discharged as to the real, but not to the personal, Estate (k).

Ecclesiastical Estates may be taken upon a Sequestration; but the Bishop in such case allots a sufficient part of the Living for the service of the Cure (l).

If an Estate be sequestered, a Person claiming an Interest in

(z) *Horn v. Horn*, Ambl. 79; and see *Martin v. Kerridge*, 3 P. Wms. 240. *Perryman v. Dinham*, Chan. Rep. 152.

(y) 3 P. Wms. 240.

(x) See *Guavers v. Fountaine*, 2 Freem. 99.

(a) Ante, p. 163.

(b) See the form of an Order of Sequestration for not paying Costs according to an Order, 1 Cox, 194; and as to Sequestrations against a Corporation for nonpayment of Costs decreed, see *Lowten v. Mayor, &c.* of Colchester, 3 Meriv. 453.

(c) *Newl. Harr.* 333.

(d) *Shaw v. Wright*, 3 Ves. 22. *Sutton v. Stone*, 1 Dick. 107.

(e) *Harvey v. Harvey*, 3 Ch. Rep. 49.

(f) Ibid.

(g) *Hamlin v. Lee*, and *Fawcett v. Fothergill*, cit 4 Ves. 747. Arg.

(h) *Wharam v. Broughton*, 1 Ves. 182. *University College Oxford v. Foxcraft*, 1 Vern. 166. S. C. 2 Ch. Rep. 241. *Bligh v. Lord Darnley*, 2 P. Wms. 619. *Burdett v. Rockley*, 1 Vern. 118. and the great Case of *Colston v. Gardner*, 2 Ch. Ca. 43. *Sed vid contra Hawkins v. Crook*, 3 Atk. 594. *Burdett v. Rockley*, 1 Vern. 58.

(i) *Bligh v. Earl Darnley*, 2 P. Wms. 622.

(k) *Hyde v. Greenhill*, 1 Dick. 107.

(l) *Ex parte Meymott*, 1 Atk. 200.

the Estate (a Mortgagee for instance) (*m*), may be examined upon Interrogatories before the Master *pro interesse suo*, and the Master makes a Report on the subject (*n*); and if it appear that such Person has a Title paramount to the Sequestration, it will be discharged against him, with or without Costs, according to the circumstances of the Case (*o*).

Where the question to be tried is pure Matter of Title and can be tried in Ejectment, the mode of examining, *pro Interesse suo*, is, by giving leave to *bring an Ejectment, the [*473 Court taking care to protect the Possession by giving proper directions (*p*).

Where Lands belonging to a Corporation were sequestered for the non-payment of Money under a Decree, a Grantee of Fee-farm Rents under the Statutes 22 Car. 2, c. 6, was allowed to come in *pro interesse suo*, but the Lord Chancellor would not order the Arrears of the Fee-farm Rents to be paid by the Sequestrators out of the Money or Rent sequestered, but allowed the Grantee liberty to distrain for his Rent at Law, without incurring any Contempt in Equity; and that no Lease or Estate derived under the Sequestrators should be made use of in Evidence against the Claimant of the Fee-farm Rents to prevent the Distress (*q*). The Chief Justice, however, who was called in to assist the Chancellor, thought the Court might order Payment by the Sequestrator, if the right to the Fee-farm rent appeared to be prior and indisputable (*r*); and the course now is, if a prior Title, founded, for instance, on a Mortgage, be set up by a Person claiming *pro interesse suo*, and the Claim is established, the Court will order the Rents and Profits of the mortgaged Estate in the hands of the Sequestrators to be applied towards the Payment of their Mortgage-money and Costs, and will order Possession of the mortgaged Estates to be delivered to the Mortgagee (*s*). Exceptions cannot be taken to the Report; but if it is objectionable the Report should be set down (*t*).

*If by the Master's Report it appears that Goods were [*474 taken, the Property of another, the Court will order them to be specifically restored, and a reference to the Master to ascertain his Damages (*u*).

Of directing an Issue, a Case, or an Action at Law.

ON the hearing of a Cause the Chancellor often deems it expedient to direct an *Issue*, a *Case*, or an *Action*. In the Court

(*m*) Phipps v. Bishop of Bath and Wells, 2 Dick. 608.

(*n*) Angel v. Smith, 9 Ves. 325.

(*o*) See note 1 to Attorney-General v. Coventry, 1 P. Wms. 309, where the following Authorities are cited. Gilb. Forum Romanum, 80. 1 Harr. Pract. 310. Wharam v. Broughton, 1 Ves. 180.

(*p*) Angel v. Smith, 9 Ves. 335.

(*q*) Attorney General v. Mayor of Coventry, 1 P. Wms. 306.

(*r*) Ibid. p. 308.

(*s*) Walker and others v. Bell, 2 Madd. Rep. 21.

(*t*) Hamlyn v. Lee, 1 Dick. 94.

(*u*) Copeland v. Mape, 3 Ball & Bea. 57.

of *Exchequer*, which is both a Court of Law and Equity, if a question of mere Law arises in the course of its Equitable Jurisdiction, the Court will decide upon it without referring it to another Jurisdiction.

References from Chancery, (except in the case of an *Heir* (x), or a *Rector* (y) who is Plaintiff (z), and, as it seems, a *Vicar* (a), proceed not of right, but of discretion (b), to satisfy the Conscience of the Court (c), concerning doubts as to *Facts*, or as to the *Law*. In doubts regarding *Facts*, an *Issue* is directed; doubts of *Law* are referred to the Judges in the shape of a *Case*.

There are Cases even as to an *Heir* where an *Issue* has been refused; as, where, on a Bill by an *Heir* at Law to try the validity of a Will made in England, the Bill was dismissed, partly on the ground of his acquiescence, both in the Ecclesiastical 475*] *Court, and upon a Bill to perpetuate Testimony, but principally because the Lands lay in *Pennsylvania*; a Will of Lands lying in any of the Colonies not being triable in *Westminster Hall* (e).

The Chancellor has a right, if he chooses (with the before-mentioned exceptions,) to take upon himself the decision of every fact put in *Issue* upon the Record; but he exercises it, to use *Lord Eldon's* expression, "*very tenderly and sparingly*" (f).

A mistake in refusing to send the Cause to a Jury is a just ground of Appeal, if the Court of Appeal should think that the contrary Decision would have been a sounder exercise of discretion; but it is a competent exercise of the authority and duty of the Court, in every case, and throughout every case, and in every stage, to determine according to its discretion, whether it does, or not, want that assistance (g).

When after an *Issue* directed the Chancellor administers equitable relief, his own Judgment ought to concur with the Verdict, or at least, he ought not to be dissatisfied with the Verdict; if he is, a new Trial will be directed (h).

If in the course of an Action brought under the direction of the Court, the mode is misconceived, the party should apply by Petition to enable the Court to do perfect justice (i).

476*] *It frequently happens that the question sent to the Jury is wide of the point, owing to the different habit of investigation which prevail in Courts of Law and Equity, and from the

(x) *Vid* *Pemberton v. Pemberton*, 11 Ves. 53.

(y) See 3 Blac. Com. 452.

(z) *Williams v. Price*, 160.

(a) *Adams v. Evans*, 4 Price, 14.

(b) *Vid* *O'Connor v. Cook*, 6 Ves. 671. S. C. 8 Ves. 538.

(c) *Richards v. Symes*, 2 Atk. 320.

(e) *Pike v. Hoare*, 2 Eden, 182. S.

C. Amb. 182; and see on this subject 1 Collect. Jurid. 246.

(f) 6 Ves. 671. *Warden, &c. of St. Paul's v. Morris*, Ves. 268.

(g) *Hampson v. Hampson*, 3 Ves. & Bea. 48.

(h) *O'Connor v. Cook*, 8 Ves. 536.

(i) *Holworthy v. Francis*, 1 Cox. p. 143.

Judge at Law not being apprized of the view with which the Issue was directed ; and so much is it felt, that the Court of Exchequer always endeavours to have Issues directed by it, sitting as a Court of Equity, tried at the Bar of the Court of Exchequer, sitting as a Court of common Law (*k*).

As Courts of Equity have a power of directing Issues, so they exercise it in their discretion, according to the nature of the case which comes before them for their Decision, and the complexion and weight of the Evidence adduced by the contesting Parties in support of or against it. If there is a contrariety of, or contradictory, Evidence, and the Persons giving it are of equal Credit, and have had equal opportunities of Information, and the Evidence is so equally balanced on both-sides that it becomes doubtful which scale preponderates, the Court in such cases will direct an Issue, in order to relieve and ease its own Conscience, and to be satisfied by the Verdict of a Jury of the truth or falsehood of the Facts controverted, lest, taking upon itself to pronounce decidedly a matter of such uncertainty, it might do injustice to one of the Parties by determining against the real truth of the Fact.

If an Issue is directed at the *Rolls*, a Motion for a new Trial may be made before the *Chancellor*. This has been done to avoid an *Appeal* ; but the **Chancellor* observed, if there [*477 was any particular discussion he should recommend it to be carried to the *Rolls* (*m*).

If a special Jury (*n*), or a view, be necessary, it must be moved for before the *Chancellor* ; and where an Issue is directed it is proper to move before him for Costs incurred by not going on to Trial (*o*).

The Party in whose favour an Issue is found, is, it seems, entitled to the Costs of trying it (*p*).

Issues may be directed not only upon the hearing of the Cause, but on Exceptions upon Facts before the master (*q*).

If Exhibits are upon Trial found to be forged, the Court will not allow the Party to go into other Evidence (*r*).

There is no instance of an Issue directed to try a *Trust* (*s*).

When an Issue is directed, it is usually ordered that the Depositions in the Cause shall be read at the Trial of the Issue, if the witness be then dead, or proved to be in such a state of health as not to be capable of attending ; for without such an Order to make the Depositions Evidence at Law, the whole Record, the Bill, Answer, and other Proceedings, must be read

(*k*) *Webb v. Rorke*, 2 Sch. & Lefr. 667.

(*p*) 1 Bro. C. C. 420. 1 Atk. 609. 2 Atk. 14. 13 Ves. 87. 1 Ball & Bea. 309.

(*m*) *Pemberton v. Pemberton*, 11 Ves. 50, 52, 53 ; but see *Bourke v. Bothwell*, 2 Ball & Beatty, 56.

(*n*) 2 P. Wms. 68.

(*o*) *Anon. ibid.*

(*q*) *Kemp v. Mackrell*, 2 Ves. 579.

(*r*) *Ibid.*

(*s*) *Yates v. Hambly*, 2 Atk. 363.

(t). In a recent case, the Depositions were ordered to be read, 478*] with a direction, "that if *the Defendant chooses to examine the Witnesses upon Interrogatories in the mean time, he shall be at liberty to do so" (u).

Where an application is made to read the Deposition of a Witness, on the Trial of an Issue at Law directed by the Court of Chancery, on the ground of the Witness being so aged and infirm as to be unable to attend in Person, it must be made to the Judge at the Trial, and not to the Court which directs the Issue (x).

Upon an Issue, an Order will not *as of course* be directed "that each Party should have liberty to examine the other as a Witness;" but if ordered, it must be with Consent (y).

The Issue is a feigned one, and tried in an Action on the Case, either at Bar, at the Assizes, or at the Sittings at Nisi Prius, in London or Middlesex (z).

The Court seldom or ever directs a Trial at Bar, but only intimates that it would be desirable (a); though it appears *Lord Hardwicke* directed a Trial at bar in the Court of King's Bench, provided the Party praying such Trial would consent that if he prevailed he would contend with *Nisi Prius* Costs (b).

If an Issue be directed, and the Defendant neglects to name an Attorney for the purpose of trying the Issue, the Court will 479*] direct him to do so in four days, *or the Issue to be taken as tried, and a Verdict for the Plaintiff (c).

The fact of a Partnership depends upon so many circumstances, that on the hearing of a Cause for the taking Partnership Accounts, an Issue, if prayed, is seldom refused (d).

When a Case is directed for the opinion of the Judges, it is usual to refer it to the Master to settle the Case; but the facts to be noticed in it may be stated in the Order by the Court (e).

If the Chancellor is dissatisfied with the opinion of the Court upon the Case, he sends the same for the opinion of another Court. There is but one instance (f) of sending a Case back to the same Court to be reviewed (g).

Where an *Action* is directed to be brought and tried, the Title is a legal one, and until the Plaintiff's Right or Title is established he hath no business in Equity; but where an Issue is directed, it is to ascertain a fact, whereby, as it is usually said, the Conscience of the Court may be satisfied before it decides;

(t) *Palmer v. Lord Aylesbury*, 15 Ves. 176. *Corbett v. Corbett*, 1 Ves. & Bea. 342.

(u) *Corbett v. Corbett*, 1 Ves. & Bea. p. 242.

(x) *Jones v. Jones*, 1 Cox, 184.

(y) *Howard v. Braithwaite*, 1 Ves. & Bea. 374.

(z) 1 Turn. & Ven. 315.

(a) Anon. MS.

(b) *Baker v. Hart*, 3 Atk. 546. S. C. 1 Ves. 28.

(c) *Wilson v. Ginger*, 1 Dick. 521.

(d) *Peacock v. Peacock*, 16 Ves. 53.

(e) *Ashburnham v. Kirkhall*, 1 Dick. 73.

(f) That was *Utterson v. Vernon*, 3 Term Rep. 529. 4 T. R. 570.

(g) *Trent v. Hanning*, 10 Ves. 495; and see *Bromley v. Holland*, Coop. 19.

and in the case of an Action, it is proper, if any objections are taken to the Verdict, they should be stated to the Court by which the Issue is directed, that such Court may consider them, and see whether they have so much weight as to render the Court dissatisfied with the Verdict (*h*).

*Though an Action be directed to be tried at Law, [*480 with special Directions, as that the Bankruptcy of the Defendant shall not be pleaded in bar, and that the Parties shall be examined on Oath, the Application for a new Trial must be to the Court of Law which has tried the Action, until that Court is satisfied with the Verdict, though it is otherwise with an *Issue*, in which case the Motion for a new Trial must be made to the Court of Chancery (*i*).

Where the Trial regards matter of importance, new Trials are granted according to the circumstances of the Case (*k*); but after three Verdicts, (in a Case where an *Issue* had been directed) in favour of a Devisee, the Chancellor being satisfied with the result of the third Trial, refused a fourth (*l*).

The Chancellor, if he pleases, may grant a new Trial even after a Trial at Bar (*m*); but whenever his conscience is satisfied, and upon the whole he is convinced that justice has been done, though he may think some Evidence was improperly rejected at Law, he is at liberty to refuse a new Trial (*n*); and though there had been two Trials upon the validity of a Will, and opposite Verdicts, yet an order of the Court of Chancery for a new Trial at Bar was upon the circumstances of the Evidence refused (*o*).

*In case a Witness dies, who was examined as a Witness at a former Trial of an Issue betwixt the same Parties, and who has been examined in the Cause, not only his Depositions may be read, but what he swore at the former Trial may be given in Evidence (*p*).

It has been held, that where it is a matter of Inheritance, the Court will, in some cases, without setting aside the first Verdict, direct a second Trial; and there the first Verdict may be given in Evidence, and will have its weight with the Jury (*q*).

The Court will not grant a new Trial upon a suggestion that the Party was not apprized of a particular Evidence, and there-

(*h*) *Towkes v. Chadd*, 2 Dick. 576. *Ex parte Kensington, Coop.* 96.

(*i*) *Ex parte Kensington, Coop.* 96.

(*k*) *Baker v. Hart*, 1 Ves. 29. *Cleeve v. Gascoigne, Ambl.* 324.

(*l*) *Pemberton v. Pemberton*, 13 Ves. 290.

(*m*) *Baker v. Hart*, 1 Ves. 28. *Warden, &c. of St. Paul's v. Morris*, 9 Ves. 165; and see particularly *Queen v. the Bailiffs, &c. of Bewdley*, 1 P. Wms. 207. See *Coker v.*

Farewell, 2 P. Wms. 564, and *Clarke v. Montgomery*, 2 Atk. 378. *Richards v. Symes*, 2 Atk. 320.

(*n*) *Ibid.* and see *Pemberton v. Pemberton*, 11 Ves. 53.

(*o*) *Salter v. Hite*, 7 Bro. P. C. 189. *Toml. Edit.*; but see *Sands v. Sands*, 1 Ves. 495.

(*p*) *Coker v. Farewell*, 2 P. Wms. 563.

(*q*) *Baker v. Hart*, 3 Atk. 542. *S. C.* 1 Ves. 28.

fore not prepared to give an Answer ; for on finding such Evidence brought forward it was in his power to be nonsuited, and then he might have come back to the Court for new directions, and another Issue at Law would have been directed, notwithstanding the Nonsuit (r).

The Chancellor may go farther in the Direction of a new Trial than Courts of common Law can ; for if a Verdict is not against Evidence, a Court of Law cannot grant a new Trial, but a Court of Equity will, in order to have justice done ; for the Verdict must be such as will satisfy the conscience of the Court (s). If, therefore, new Evidence be discovered after the Trial, a new Trial will be ordered (t).

482*] *After a Trial and a Verdict, a new Ejectment cannot be brought without leave of the Court (u).

The Court considers it as conducive to Justice to direct a Trial at Law where the question is, whether a Bill of Exchange was usurious (x) ; or what Damages had been sustained by pirating a Work (y).

Rehearing.

A PARTY dissatisfied with a Decree, may apply for a Rehearing to the Judge who decided the Cause. A *caveat* is in such case entered to prevent the signing and enrolment, of the Decree for twenty-eight days ; for after Enrolment, as before observed, it cannot be re-heard (z). Though only one of several Defendants has signed and enrolled the Decree, it prevents a Rehearing (a).

The granting of a Rehearing does not stay Proceedings on the Decree, unless a special Order be obtained for that purpose (b).

A Petition for the rehearing of any Cause, Exception, Plea, or Demurrer, must be presented within a *fortnight* after the Order pronounced (c) ; and by an Order (d), a Deposit of 10*l* must be made by the Party applying for a Rehearing.

A Petition for a Rehearing must be signed by two Counsel ; and such credit is given by the Court to their opinion that the 483*] Cause ought to be re-heard, *that it will order a Rehearing (e). It seems discretionary, however, in the Judge, whether he will allow a Rehearing (f) ; and *Lord Thurlow* on one

(r) *Richards v. Symes*, 2 Atk. 321.

S. C. Barn. 90.

(s) *Lord Falconberg v. Pierce*, 234.

Ambl. 210.

(t) *Stace v. Mabbot* 2 Ves. 553.

(u) *Sands v. Sands*, 1 Ves. 495.

(x) 6 Ves. 193. cit. 1 Turn. & Ven. 315.

(y) *Salwyn v. Bridgman*, mentioned 1 Turn. & Ven. 315.

(z) 3 P. Wms. 371.

(a) *Gore v. Purdon*, 1 Sch. & Lefr.

234.

(b) Ord. Cha. 208.

(c) 2 Turn. & Ven. 885.

(d) 30 April 1701. See 4 Bro. C.

C. 545.

(e) Ambl. 91.

(f) 3 P. Wms. 8.

occasion refused it (*g*) ; but in general, the Chancellor considers it as his duty to re-hear when called upon so to do, in order, if possible, to save the expense and delay of an Appeal (*h*).

The Petition of Rehearing ought to state the grounds on which it is sought to re-hear the Cause (*i*) ; but it must not state a Case different from that on which the Decree was founded, by introducing circumstances not before the Court at the time the Decree was made (*k*) ; but on such Rehearing additional Evidence may be adduced (*l*).

In a Case, in which Lord Hardwicke, on a *Rehearing*, altered his opinion, he observed, " These are the reasons which induced me to alter my opinion, and I am not ashamed of doing it ; for I always thought it a much greater reproach in a Judge to continue in his error than to retract it" (*m*).

Upon a Petition by the Plaintiff to re-hear, the cause is open as to the *whole* and *every part* of it with respect to the Defendant ; but as to the Plaintiff it is only open *as to those parts* of it *complained of* in the Petition (*n*). If the Petition be against the *Decree in general, though particular reasons are given, [*484 the whole is open (*o*).

Upon re-hearing a Cause which was originally heard before the Chancellor, it must be opened as a Case (*p*).

There may be two Hearings at the Rolls, and a Hearing upon Appeal before the Chancellor (*q*) ; but a Rehearing will not be allowed after an Appeal to the Chancellor from the Rolls has been dismissed (*r*), unless, perhaps, where there is a manifest mistake, or where the Judge who made the Decree has reason to apprehend from his own reflections that he has mistaken the Case (*s*).

After twenty years have elapsed from the time of the Decree, the Court will not permit a *Rehearing* (*t*).

There cannot be a Rehearing after a Decree by consent (*u*) ; but an Agreement to submit to such Decree as the Court should make, and that neither Party should lodge an Appeal, does not prevent a Rehearing (*x*).

Sometimes, when a Cause comes on for further directions, and the Decree appears to be wrong, it is, by the consent of

(*g*) Fox v. Mackreth, Har. Juri. Arg. 451. S. C. 2 Cox, 158.

(*h*) Pentland v. Stokes, 2 Ball & Beatty, 76.

(*i*) Gifford v. Hart, Sch. & Lefr. 398.

(*k*) Wood v. Griffith, 1 Meriv. 35.

(*l*) Cotterel v. Purchase, 1 Atk. 390. Dashwood v. Lord Bulkeley, 10 Ves. 236. White v. Fussell, 18 Ves. 153.

(*m*) Galton v. Hancock 2 Atk. 439.

(*n*) Rawlins v. Powell, 1 P. Wms. 300.

(*o*) Colchester v. Colchester, Sch. Cas. in Chan. 13, 14.

(*p*) 2 Atk. 50.

(*q*) Brown v. Higga, 8 Ves. 563. Blackburn v. Jenson, 2 Ves. & Bea. 360.

(*r*) Fox v. Mackreth 1 Vol. Har. Jur. Arg. 451.

(*s*) East India Company v. Boddam, 13 Ves. 423.

(*t*) Smith v. Cave, 3 Bro. Cha. C. 643, in note. S. C. Ambl. 649.

(*u*) King v. Wightman, 1 Anstr. 80.

(*x*) Bluck v. Fawcett, 3 P. Wms. 242.

all Parties, varied, and got rid of by a short Petition of Rehearing (y) ; and the Court, it seems, will in its discretion, allow a 485*] Rehearing* where it is necessary to complete what it has done ; as, for instance, to explain what it meant by its Decree, and where a short Order would be sufficient (z).

If the objection to a Decree is upon matter of Law apparent, or a mistake in Law to be collected from all the Pleadings and Evidence, the Decree not being signed and enrolled, it is the subject of a Rehearing, and there is no occasion for a Bill in the nature of a Bill of Review, unless a Supplemental Bill is also necessary to introduce new facts ; in which case the Cause will come on to be heard upon the matter of that Supplemental Bill, together with a Rehearing of the original Cause, and the Court will vary the Decree upon the Rehearing ; taking into consideration the new, or lately discovered Facts ; but there is no instance of a Bill in nature of a Bill of Review upon Error apparent (a).

A Rehearing in respect of Costs is allowed only under particular circumstances (b).

If a *Rehearing* is permitted, the Party is bound to pay such Costs subsequent to the Decree, as the Court shall think proper (c).

If there has been a Decree *nisi* by default, the Court will allow a Rehearing, on terms (d) ; but in general, the Decree must be complete and absolute before there can be a Petition for a Rehearing (e).

486*] *If a Decree be obtained by default, and there is a Petition for a Rehearing, and the Person in possession of the Decree does not attend at the Rehearing, the Bill will be dismissed with Costs as to the Petitioner (f).

In the case of Creditors coming in before the Master upon a Decree, they have been held entitled to re-hear the Cause, though not otherwise Parties, the Decree affecting their Interests (g).

Motions after Decree.

We shall now notice the Motions which are frequently made after a Decree.

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| (y) <i>Bailey v. Elkins</i> , 7 Ves. 324. | and see <i>Cunningham v. Cunningham</i> , Amel. 89. |
| (z) <i>Broomhead v. —</i> , 1804, MS. | (e) <i>Baxter v. Wilson</i> , 2 Atk. 152. |
| (a) <i>Perry v. Philips</i> , 17 Ves. 178. | (f) <i>Wilson v. Dabbs</i> , Sel. Cas. in Chan. 50. |
| (b) <i>Cowper v. Scott</i> , 1 Eden, 17. | (g) <i>Giffard v. Hoste</i> , 1 Sch. & Lefr. 409. |
| <i>Owen v. Griffith</i> , 1 Ves. 250. | <i>Osborne v. Usher</i> , 2 Bro. P. C. 314. |
| (c) Vid. General Order, 4 Bro. C. C. 546. | |
| (d) <i>Vowles v. Young</i> , 9 Ves. 173 ; | |

1. *Motion to rectify the Minutes of the Decree.*

It has always been the practice of the Court of Chancery to receive Petitions from either side to rectify the Minutes of any order or Decree pronounced by the Court, while the same rests in Minutes, without being drawn up by the Registrar in form; and to vary or alter such Minutes, if the Court shall see sufficient cause at any time before the Order or Decree be regularly passed by the Registrar, and entered. While the Decree rests in Minutes, it is considered as imperfect, and liable to be altered at any time, by application to the Lord Chancellor, in order to have the same perfect, and agreeable to his Lordship's opinion, before it is drawn up (h). There is [*487 an Order (i) that no application shall be made against the Minutes after a Week (k); but the practice seems to be, that a Decree may, on a proper application, be altered the same term it is pronounced (l), or at the Seal after (m), without a Rehearing; an omission, however, in a Decree, of a direction *quite of course*, the usual direction, for instance, on a Bill by Creditors, "to take an account of the personal Estate (n)," will be supplied on a special Motion. And so, in like manner, a clear mistake in a mere matter of figures may be rectified (o). So, where by mistake the Decree directed Money to be paid in, which had already been paid in, the Decree was varied (p). So on a Motion, with consent, an addition was made to the Decree, by directing "a Reference to the Master to take an Account of the Dividends received since the death of the Testator by the Defendant upon the Funds, directing by the Decree to be transferred, with the consequential directions that what shall be reported due from him on that Account may be paid into the Bank (q)." So where after a direction for the taxation of Costs, the words "as between Attorney and Client" were by [*488 mistake omitted, they were, on the consent of all Parties, ordered to be inserted (r). In a Case, however, where the Decree which was passed omitted to give the Costs of the Suit to a Defendant, a mere Trustee and as such entitled to them, if asked for on the Hearing, the Court on Petition refused to give

(h) See Arg. in Sir John Eden and others, Appellants, v. the Earl of Bute and others, 7 vol. Bro. P. C. 204.

(i) Ord. Can. 213.

(k) Anon. Select Cas. 21.

(l) Vaughan v. Blake, Vin. Abr. tit. Decree (D.) Ca 25.

(m) 1 Turn. & Ven. 100, in note.

(n) Pickard v. Mattheson, 7 Ves.

233. In Wallis v. Thomas, 7 Ves. 292, a Motion was made to add to the

Decree a direction "for the Parties to be exonerated on Interrogatories;" the Lord Chancellor did not vary the Decree, but made an Order for the Parties to be examined on Interrogatories.

(o) Pract. Reg. Wyatt's Edit. 155.

(p) Lane v. Hobbs, 12 Ves. 458.

(q) Newhouse v. Mitford, 12 Ves. 456.

(r) Skrymser v. Northcote, Cor. Master of the Rolls, 29th April 1819.

the Costs (*s*); and this operated very severely, for a *Rehearing* as to Costs is not allowed.

If a Decree rests in Minutes, and the Defendant dies before it is drawn up, the Decree cannot be passed and entered, *nunc pro tunc*, but the suit must be revived before the Decree is drawn up (*t*).

Sometimes, though it is irregular, a point is argued by leave of the Court, on a Motion to vary Minutes (*u*).

2. To suspend the Execution of a Decree.

THE Execution of a Decree is not stayed by an Appeal to the Lord Chancellor, or to the House of Lords (*x*); but a Motion may, under special circumstances, be made to the Chancellor, where the Appeal is to him, or to the House, where the Appeal is to the House of Lords (*y*), or to the Court below, to stay the Execution of the Decree until the Appeal is decided; but it is more expedient that the application should be made to 489] the House, rather than to *the Court below, as the Order made by the Court might be the subject of Appeal (*z*).

The House of Lords, on such special Application, will determine as to the mode of proceeding, either by bringing forward the Appeal, or by deciding itself, or remitting the Suit to the Court below to decide, under what regulation such Order should be made (*a*).

It seems to be a general Rule, that on such an Application to the Chancellor, the Costs of the Motion follow the Judgment, for such Motions amount in effect to a *Rehearing* (*b*).

If a Decree be for the specific performance of a Contract, and there be an Appeal to the Chancellor, he will, upon Application for that purpose, suspend the execution of the Conveyance, but will do no more (*c*).

In a Case where a Mortgagee obtained a Decree, it was, on Motion, suspended for six months, from the time fixed by the *Master's* Report, upon the Mortgagor's bringing the Money into Court, consenting to a Receiver, and paying Interest from the time of filing the Bill, and Costs, and the Plaintiff's undertaking to repay, if the Decree should be reversed (*d*).

If after a Decree, a Subpœna issues for Costs, an Appeal afterwards, does not form a ground for staying such Process (*e*).

(*x*) *Colman v. Sarrell*, 2 Cox, 206.

(*z*) *Huguenin v. Bazely*, 15 Ves.

(*y*) *Bertie v. Lord Falkland*, 1

182.

Dick. 25.

(*a*) *Gwyne v. Lethbridge*, 14 Ves.

(*u*) *Perry v. Phillips*, 1 Ves. jun.

586.

251.

(*b*) *Willan v. Willan*, 16 Ves. 206.

(*x*) *Warden and Minor Canons of St. Paul's v. Morris*, 9 Ves. 316; and *vid. General Order of the House of Lords*, 12 Aug. 1807. 15 Ves. 184.

Monkhouse v. Corporation of Bedford, 17 Ves. 381.

(*c*) *Gwyn v. Lethbridge*, 15 Ves.

585.

(*y*) *Popham v. Horner*, Colles' Appeal Cases. *Waldo v. Caley*, 16 Ves. 209. S. C. MS.

(*d*) *Monkhouse v. Corporation of Bedford*, 17 Ves. 380.

(*e*) *Roberts v. Totty*, 19 Ves. 446.

*3. *Motion to restrain a Creditor or Legatee from suing at Law.*

Before a Decree, a Creditor cannot be stopped from proceeding at Law (e); but where a *Decree has been made* for the Administration of Assets, the Plaintiff in the Suit (f), or the Defendant, an Executor, may move to restrain a Creditor from proceeding at Law upon an Affidavit by the Executor, where the Motion is on his behalf, of what money he has in his hands; for from the moment of the Decree, the Court proceeds on the ground that the same is a Judgment in favour of all the Creditors, and that all ought to be paid according to their priorities as they then stand; and that the Court cannot execute its own Decree if it permits Courts of Law to alter the course of Payment (g). Until Notice of the Decree to a Creditor, the Party seeking to restrain his Proceedings at Law must pay the Costs occasioned by not giving Notice, and suffering him to go on; but he is not allowed Costs incurred after Notice of the Decree (h). In one Case it was held, that only those Creditors who filed the Bill and obtained a Decree could be deprived of the advantage of proceeding at Law (i); but that is not now the practice.

*If the Creditor brought his Action *before* the Bill was [*491 filed, and chooses to *discontinue*, he will be allowed to prove his Costs at Law in addition to his Debt, under the Decree (k).

Formerly, where there had been a Decree for the Administration of Assets, a Bill was filed by the Executor against a Creditor suing at Law to obtain an Injunction to stay proceedings (l); but *Lord Rosslyn* altered the practice, and permitted a *Motion* to be made to restrain a Creditor suing at Law; and *Lord Eldon* adhered to that practice (m). Formerly, also, if Bond Creditors of the Ancestor had obtained a Decree for the Sale of Lands against the Heir, an Injunction was, on a *Bill* for that purpose, awarded against other Bond Creditors to restrain their proceedings at Law (n), but a *Motion*, it seems, would now answer the purpose.

(e) *Rush v. Higgs*, 4 Ves. 638; and see *Lurgan v. Bowen*, 1 Sch. & Lefr. 299.

(f) *Terrewest v. Featherby*, 2 Meriv. 480; and see 1 Bro. C. C. 185.

(g) *Largan v. Bowen*, 1 Sch. & Lefr. 299.

(h) *Paxton v. Douglas*, 8 Ves. 520; and see *Hardcastle v. Chettle*, 4 Bro. C. C. 163. In a recent Case before the Vice Chancellor, 25th Dec. 1815, it was held the Creditor must have Notice of the Motion and of the Decree.

(i) *Sheppard v. Kent*, 2 Vern. 435.

(k) *Goate v. Fryer*, 3 Bro. C. C. 23. S. C. 2 Cox, 201.

(l) See *Farnham v. Burroughs*, 1 Dick. 63. *Douglas v. Clay*, *ibid.* p. 393. *Kenyon v. Worthington*, 2 Dick. 668, and *Brooks v. Reynolds*, 1 Bro. C. C. 183, a case of that kind. See also what is said in *Sir Charles Cox's Case*, 3 P. Wms. 343, and *Goate v. Fryer*, 2 Cox, 201. S. C. 3 Bro. C. C. 23.

(m) *Paxton v. Douglas*, 8 Ves. 520. See *ante*, 1 vol. 469.

(n) *Martin v. Martin*, 1 Vez. 211.

Where a Decree has been obtained by a Creditor on behalf of himself and other Creditors, a prior Creditor, who has obtained Judgment at Law in Ejectment, grounded on an Elegit, will not be allowed to get into Possession, and thereby disturb the proceedings in Equity (o). But an Injunction has been refused after a Decree to Account to restrain a Creditor from proceeding at Law upon a Verdict *which would entitle him to a Judgment *de bonis propriis* against an Executor (p).

There does not seem any difference, whether the Decree for the Administration of Assets is at the Suit of Creditors or of the Executor; in both cases a Creditor proceeding at Law is restrained (q).

After a Decree for an Account and Payment of Debts and Legacies, under which all Creditors or Legatees may claim, subsequent proceedings, either at Law or in Equity, will not only be restrained as against a separate Creditor, but also against a *Legatee* (r).

4. Motion to enlarge the Time of Payment of Mortgage Money.

UPON a Bill of *Foreclosure*, the Court will, though with regret, as the Mortgagee is often a great sufferer by it, enlarge the time for Payment of the Mortgage-money (s), for six months (t), 493*] and *again for three months, upon paying the Interest due, and Costs (u). In one case the Court under the circumstances made four Orders, giving further time, though the third Order was peremptory (x); but if a Bill is brought to *redeem*, the Court will not extend the time for Payment of the Mortgage-money (y).

(o) *Sumner v. Kelly*, 2 Sch. & Lefr. 398.

(p) *Terrewest v. Featherby*, 2 Meriv. 480, and the Cases cited in note to p. 481 of that Case.

(q) See 1 Bro. C. C. 185. Arg^o.

(r) *Redesd. Tr.* Pl. 137.

(s) *Novosielaki v. Wakefield*, 17 Ves. 417. It is different in *Ireland* and in *Scotland*; for the Courts in those Countries never interfere in the manner in which Courts of Equity do in England, to protect the borrower against the immediate Payment of Money vested in Land; on this account, Money is in those Countries much more frequently lent on Mortgage than in England. Lord Eldon has regretted that the Court ever varied the Agreement of the Parties in these Cases. [Anon. 21 Dec. 1803. MS.] and has truly observed, that failure of Payment at the time may be attended with mischievous consequences that can never

be cured in a rational sense by subsequent Payment with Interest. [*Reynolds v. Pitt*, 19 Ves 140.] During the Usurpation it was recommended that a limited time should be given for Mortgagors to redeem. [See vol. 20, Parl. Hist. 206.] The best mode of preventing delay in the Recovery of Money lent on Security is that which is adverted to ante, 1 vol. p. 514.

(t) *Ismoord v. Claypool*, Chan. Rep. 262. In this early case six Months was given for Payment not only of the Principal, but of the Interest and Costs.

(u) *Monkhouse v. Corporation of Bedford*, 17 Ves. 382.

(x) *Edwards v. Cunalife*, 1 Madd. Rep. 287. There were, however, extraordinary difficulties in raising Money at that period.

(y) *Novosielaki v. Wakefield*, 17 Ves. 417.

5. *That Trustee may let Infant's Estate.*

WHERE the Property is small, the Court will, on Motion, and without a Reference to the Master, make an Order that the Trustee may be at liberty to let, with the approbation of the Receiver; but this should not extend to Building-leases, or Leases extending beyond the Infant's Minority (z).

6. *For Payment of Money into, or out of, Court.*

AFTER the usual Decree for an Account (contrary to the old Practice) (a) the Court will, on Motion, order Payment into Court of the amount of the Principal Sums admitted to be due by Examination upon *Interrogatories*, but will not extend the Order to Interest (b); or, at least, not to all the Interest admitted to be due (c). If, by new *Interrogatories*, the Plaintiff extracts an admission of a further Sum *in his hands, the *[494 same, it seems, will be ordered to be paid into Court (d).

Wherever an Order is *general* for the payment of Money into Court, it is necessary to obtain a short Order, fixing a limited time within which the Money shall be paid; and for the purpose of Commitment for not paying the Money, the Person serving the Order must have authority to receive the Money (e).

An Order for a Transfer and Payment of Money out of Court has been made where the right is clear, though the Cause has abated by the death of the Plaintiff (f).

A Motion, it seems, may be made by a Residuary Legatee to have part of her Legacy paid after a Decree, and before a Report, where no Creditors appear (g). So Arrears of an Annuity have, on Motion, been ordered to be paid to a Widow and Executrix, although no Report of Debts had been made, it being stated by her Answer that there was no deficiency of Assets (h); and in the case of the late Duke of Queensberry's Will, Legatees were ordered their Legacies before a Report; but *Vice Chancellor Leach* disapproved of these sort of Motions, and has frequently said, that he would not order a Legacy to be paid where the Affairs were not wound up, unless there was a clear Title to the Legacy, and where no diligence could speedily wind up the Affairs.

*If the Representative of a deceased Person move as [*495

(z) *P — v. Bell*, 6 Ves. 419.

(a) 19 Ves. 117.

(b) *Wood v. Downs*, 18 Ves. 49.

(c) *Fairly v. Freeman*, mentioned 18 Ves. 50.

(d) *Hatch v. —*, 19 Ves. 117.

(e) *Wilkins v. Stevens*, 19 Ves. 118.

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(f) *Roundell v. Curren*, 6 Ves. 250.

(g) *Anon.* 1806. A similar Order was, with some hesitation, made by the Master of the Rolls, on the 14th or 15th May 1807.

(h) *Skinner v. Sweet and Wife*. Coop. 54.

such for Payment of Money out of Court, there must be a *Prerogative Administration* (i).

It has been recently held that, wherever Money is sought to be paid out of Court, it must be by *Petition*; to prevent a surprise on the Court (j).

7. *For leave to prosecute, or come in under a Decree.*

CREDITORS who come in under a decree for an Account, may, if necessary, obtain an Order to prosecute the Decree (k).

If a Suit is by *Creditors* on behalf of themselves and other Creditors, it is not an unusual application for a Creditor to apply for leave to prosecute the Suit where there has been improper delay, because it may be an amicable Suit; and the Court will give Costs to the Party making the application. So, it seems, if a Suit be instituted by a *residuary Legatee*, or by the next of Kin, a Creditor may apply for leave to prosecute the Suit (l).

A Creditor may move to obtain leave to prove his Debt under a Decree, although the time mentioned in the decree has elapsed, provided the Fund has not been distributed, upon paying 496*] the Costs of the *Application; and if the Effects have been apportioned, the Creditor must pay the Costs of re-casting the Apportionment (m).

A Defendant, if interested in taking the Accounts against an Executor, a Co-Defendant, may move for leave to attend the Master in taking the Accounts (n).

8. *To confirm Reports, Nisi, or Absolute.*

REPORTS will presently be observed upon.

Reports regarding *Receivers*, *Guardians*, or *Maintenance*, are never, it seems, confirmed (o); but other Reports are confirmed, first, *nisi*, and then *absolutely*; though in the *Exchequer*, when the Deputy Remembrancer reports that a good Title can be made, his Report is in the first instance absolutely confirmed (p); unlike the Practice of the Court of Chancery, where such Reports are first confirmed *nisi*, and afterwards *absolutely*.

(i) *Challnor v. Murhall* 6 Ves. 118. *Newman v. Hodgson*, 7 Ves. 400. *Thomas v. Davies*, 12 Ves. 417, which overrule *Sweet v. Partridge*, 5 Ves. 148; and *Decker v. Horner*, 3 Bro. C. C. 240. S. C. 2 Dick. 746, and some other Cases where a Prerogative Probate, it was held, might be dispensed with, the Sum being small. A bill ought to be brought into Parliament to provide for these Cases. [See *Newman v. Hodgson*, 7 Ves. 409.]

(j) Per Vice Chancellor Leach on several occasions.

(k) *Creuze v. Hunter*, 2 Ves. jun. 165.

(l) *Sims v. Ridge*, 3 Meriv. 463, 4.

(m) *Angell v. Haddon*, 1 Madd. Rep. 528.

(n) See *Pearce v. Crutchfield*, 46 Ves. jun. 49.

(o) *Thomas v. Dawkins*, 3 Bro. C. C. 509. *Greenwell v. Greenwell* 5 Ves. 199.

(p) *Eyton v. Dicken*, 4 Price, 303.

After a final Report of Costs, &c. and nothing remaining to be done but an application of the Fund, a motion may in some cases be made that Services upon the Clerks in Court of the Defendants should be good Service, in order to confirm the Report; as where the Motion was supported by an Affidavit that some of the Defendants lived in the East, and some in the West Indies, and others in different parts of the Country. In this case there were five Defendants. *Sir John Fortescue* appears to have thought there should be seven or eight Defendants to warrant such a Motion, but it seems that the distance at which Parties live, and not their number, gives the right (g).

Nothing but an Order for setting down Exceptions for Argument is a sufficient cause against making the Order for confirming a Report absolute. Filing Exceptions, and making the Deposit, are of no avail without that Order (r).

Either Party may set down Exceptions to be argued. Sometimes the Party against whom Exceptions are taken sets them down, though at some expense, because he can choose where to set them down (s).

If a Motion to confirm a Purchase *nisi*, be made on the last Seal-day but one, and if on that day the eight days have not expired, the Purchaser cannot move on the last Seal-day, that two days after, when the eight days have expired, he may move to confirm the Report *nisi* (t).

After a Report is confirmed of a Person being the best Purchaser, he must from that time, or rather from the time when he could have confirmed the Report (u), pay Interest on his Purchase-money, and the Seller become a Trustee for the Purchaser, and the Purchaser has all the advantage or disadvantage of any casualty after that time (x).

Where Estates for Lives have dropped in between a Person's being reported the best Purchaser by the Master, and his taking Possession, the Court have directed the Purchaser to [*498 make some compensation in consideration of the Estate being bettered, or otherwise to have the Estate re-sold (y).

In a Case where there was a Loss by Fire, after the Report, but before the Confirmation, it was determined that it should fall upon the Vendor; and the circumstances that the Sale had been delayed by the Purchaser's having opened the Biddings, was not considered as of importance (z).

The Rule that a Purchaser shall have Possession from the Quarter-day preceding the Sale does not apply to a Colliery. The period in such case is from the Month or Week in which

(g) *Jackson v. —*, 2 Ves. jun. 417.

Gildart v. Moss, 4 Ves. 613.

(r) *Ibid.*

(s) *Coffin v. Cooper*, 11 Ves. 600.

(u) *Twigg v. Fyfield*, 13 Ves. 517.
(x) *Ex parte Manning*, 2 P. Wms.

410.

(y) *Blount v. Blount*, 3 Atk. 638.

(z) *Ex parte Minor*, 11 Ves. 559.

the Purchase takes place, according to the usual course of taking the Account (a).

One Purchaser will not be permitted to be substituted for another, though he offers to pay in the Purchase-money, unless upon an Affidavit that there is no underhand Bargain (b).

A Report after Confirmation, may, it seems be ordered to be reviewed (c); and where a Report was confirmed in favour of a Title by one Master, and another Master, in another proceeding, made a Report by which the Title was affected, on a Motion to refer back the Title to the Master who had reported there was a good Title, an Order was made for that purpose (d); but 499*] where a Report was confirmed, and *followed by a Decree, an Order cannot be made to review the Report (d).

9. Motion for a new Trial of an Issue.

THIS subject has already been adverted to (e).

The Court, in these cases, feels the great disadvantage of judging of the Evidence from the Judge's notes (f).

If a Verdict is founded upon Evidence that ought not to have satisfied the Judge, a new Trial will be granted. On the other hand, if it ought to have satisfied the Judge, no new Trial will be granted (g); but the improper rejection of written Evidence is not a sufficient ground for granting a new Trial of an Issue, if the Chancellor is satisfied with the Verdict upon all the Evidence, including that rejected (h).

A Party to an Issue cannot have a new Trial on the ground that he had kept back material Evidence. If it had been kept back by accident, fraud, or surprise, and not *ex proposito*, it would be different (i).

10. Motions respecting Defendant's Examination.

UPON a Motion for a Commission to take the Defendant's Examination, the time is left to the Master, and is not limited by the Order (k).

500*] If an Examination taken before the Master in *Pursuance of a Decree is satisfactory to the Master, but not so to Parties in the Cause, an Order may be obtained to refer the Examination back to the Master to look into it, and see whether it is

(a) Wren v. Kirton, 8 Ves. 502.

(b) Vale v. Davenport, 6 Ves. 615.
Rigby v. Macnamara, 6 Ves. 515.

(c) Turner v. Turner, 1 Dick. 313;
and see what is said Turner v. Turner, 1 Swanst. 156.

(d) Jewdine v. Alcock, 1 Madd. Rep. 597.

(d) Turner v. Turner, 1 Swanst. 154.

(e) Ante, p. 476, 480, &c.

(f) Bates v. Graves, 2 Ves. jun. 288.

(g) Ibid.

(h) Hampson v. Hampson, 3 Ves. & Bea. 41.

(i) Standen v. Edwards, 1 Ves. jun. 133.

(k) Hairby v. Emmet, 5 Ves. 683.

sufficient; and this, in *general* terms, and without stating any *particular* points of objection; and if he reports it sufficient, an Exception may be taken to his Report, and the Judgment of the Court obtained.

But the taking of Exceptions in the same general manner is inconvenient, and discouraged; and in a case of that description where the Exception was overruled, the Court has given Costs beyond the Deposit (*l*).

An Order may be obtained, (but it is not of course,) that the Plaintiff may be at liberty to add new Interrogatories for the Examination of the Defendant, the Examinations already put in being reported insufficient (*m*).

After a Decree, a Motion may be made by one Defendant for an Order to examine another Defendant; but the order is not *of course*, after a Decree, as it is when application is made *before* a Decree (*n*).

If a Party refuses to put in his Examination before the Master, Process of Contempt will, on Motion, be issued to compel him.

If the Party, while the Writ and Order is in the hands of the Serjeant at Arms, tenders his Examination, the Master is bound to accept it, but the *Party in Contempt must pay the [*501 Costs incurred by such Contempt (*o*).

A Defendant (*p*), or Solicitor (*q*), arrested on his return home from his Examination before the Master, will, on Motion and Affidavit, be discharged, and not only in the original Action, but also from Detainers afterwards lodged against him (*r*). So, if a Person is arrested who is going before a Master to prove his Debt (*s*), or returning from an attendance on a Warrant before the Master (*t*), he will be discharged.

11. *Motion to open Biddings.*

BIDDINGS are opened for the benefit of the Suitor and of the Estate, and not for the advantage of the Purchaser (*u*). By some Judges, it has been thought that the permission to open Biddings does more harm than good (*x*); by others, that the right to open Biddings should not be so much restrained as it is, (*y*).

A Person who from speculations of his own, opens Biddings, but is not the Purchaser, is entitled to his Deposit, but not to

(*l*) Purcell v. M'Namara, 12 Ves. 166.

(*m*) Anon. 3 Atk. 511.

(*n*) Franklyn v. Colquhoun, 16 Ves. 218.

(*o*) Anon. 29th July 1805. MS.

(*p*) Sidgier v. Birch, 9 Ves. 69.

(*q*) Ex parte Ledwich, 8 Ves. 598.

(*r*) See Moore v. Aylett, 2 Dick. 780.

(*s*) See what is said in List's Case, 2 Ves. & Bea. 374.

(*t*) Franklyn v. Colquhoun, 1 Madd. Rep. 580.

(*u*) Anon. 1 Ves. jun. 453.

(*x*) Anon. MS.

(*y*) V. C. Leach expressed himself of that opinion, 16 Jan. 1818. MS.

his Costs, although the Estate upon the Re-sale sells at a much higher Price (z) ; but if the Party opening the Bidding, does it 502*] not on his *own account, but for the benefit of the Family, who by an advance on the Re-sale has been considerably benefitted, he is, under the special circumstances, allowed his Costs (z).

If a Solicitor buys in Lots, with a view to prevent a Sale, at an undervalue, he will be obliged to keep the Lots, if the Court thinks he ought (a).

Biddings, it seems, will be opened on a proper offer, even in favour of a Person who was present at the Sale (b) ; but the Decisions are contradictory (c).

A Motion to open Biddings will not be allowed as a Rule merely on an offer made of ten per-cent. advance (d). In some cases, upon a small Sum, that advance would be sufficient (e) ; in some, even a less advance would be sufficient ; in a Creditor's Suit, for instance (f), or on a Sale in Lunacy (g) ; and in other cases more would be required (h). When Biddings are opened there must be a Deposit of ten-per-cent. (i) ; nor will the Court dispense with it, though the Parties are satisfied with the Purchase (k).

503*] *If the Deposit has been laid out in the Funds, it is considered as part of the Purchase-money paid, and therefore the Depositor is not entitled to the Dividends accruing between the time of the Deposit and the completion of the Purchase, but only to Interest on the Deposit at four-per-cent. (l).

(z) Rigby v. Macnamara, 6 Ves. 466. Earl of Macclesfield v. Blake, 8 Ves. 214. Trefusis v. Clinton, 1 Ves. & Bea. 361. Lord Eldon has said that Rigby v. Macnamara was determined upon great consideration, and that it is a settled point. [Anon. MS.]

(a) Owen v. Foulkes, 9 Ves. 348. West v. Vincent, 12 Ves. 6.

(b) Nelthorpe v. Pennyman, 14 Ves. 517.

(c) Rigby v. M'Namara, 6 Ves. 117. Tait v. Lord Northwick, 5 Ves. 655.

(d) See M'Culloch v. Cotbatch, 3 Madd. Rep.

(e) Brydges v. Phillips, MS. 21st Dec. 1803.

(f) Upton v. Lord Ferrers, 4 Ves. 700.

(g) Brooks v. Snaith, 3 Ves. & Bea. 144.

(h) On an offer of little more than six-per-cent. a Sale under an order in Lunacy was opened. [Ex parte Tinsley, 22d Jan. 1819.] In this Case there was a purchase of two Lots, and the Lord Chancellor would not suffer the Sale of one Lot to be opened unless the other was, except the

Purchaser chose to keep the Lot as to which the Bidding was not sought to be opened ; because he might not have bought it unless he was to have both Lots.

(i) White v. Wilson, 14 Ves. 152. Andrews v. Emerson, 7 Ves. 470.

(j) Anon. 3 Madd. Rep. 494.

(k) Anon. 6 Ves. 515. When the Manor of Great Thurlow, in Norfolk, was sold, while Lord Thurlow was Chancellor, Mr. Scott (now Lord Eldon) moved to open the Biddings before Sir Thomas Sewell, upon an advance from 5700*l.* to 6700*l.* The Master of the Rolls inquired what Deposit would be made ? In answer it was said, that all the Parties were satisfied with the Purchaser, upon which the Master of the Rolls replied, not knowing the circumstance, that if the Lord Chancellor was the Bidder, he should make a large Deposit ; the Deposit being the only hold the Court has on a Purchaser ; and ordered a Deposit of the whole advance. See 6 Ves. 518.

(l) Doyley v. Countess of Powis, 1 Cox, 206 ; and see Ambrose v. Ambrose, 1 Cox, 194.

Biddings, in some cases, have been opened after confirmation of the Report upon a satisfactory offer (*m*); and the rule formerly was, that Biddings might be opened after the Report was confirmed, under particular circumstances, and in the discretion of the Court (*n*). A great increase of Price, for instance, with the additional circumstance, that the Person for whose benefit the Sale was, was in Prison, was held a sufficient ground to open the Bidding (*o*). But now, it seems, after *confirmation of the Report* of a Purchaser whose conduct has been fair, the Court will not open Biddings on account of an increase of Price offered (*p*), or of negligence, surprise, or circumstances of that kind (*q*), nor unless there is **fraud or misconduct* in the [*504 Purchaser, or fraudulent negligence in another Person; as, the Agent; or unless some particular principle arises out of the Purchaser's character, as connected with the Ownership of the Estate, or some Trust or confidence, on his conduct in obtaining the Report (*s*).

Biddings will be opened upon a second application by the same Person, and Payment of all Costs, the Purchaser not appearing upon Notice (*t*).

Where Biddings are opened, it is upon paying the Costs to the Purchaser, and the Master, under the general direction, makes the allowance. There is no instance of a particular direction for a specific expense (*u*).

Where an Estate was sold before the Master for the Payment of Debts, and *A.* was reported the best Bidder, but before the Report was confirmed it was discovered that *A.* was insane at the time of Bidding, the Court directed the Estate to be re-sold (*x*).

Where a Person had purchased two Lots, the Lord Chancellor refused to let the Biddings be opened as to one Lot only, but ordered, that if the Purchaser chose he might keep the other Lot, but if he did not choose to keep it, the Biddings must be opened as to both Lots, and all the Purchaser's Expenses **paid*; and this on the ground that he would not, perhaps, [*505 have purchased the one Lot without the other (*y*).

(*m*) Boyer v. Blackwell, 3 Anstr. 177; and see Gower v. Gower, 656. mentioned in that Case, and since reported, 2 Eden, 348, and affirmed in the House of Lords, 6 Toml. P. C. 396; see also Prideaux v. Prideaux, 1 Bro. C. C. 287.

(*n*) White v. Wilson, 14 Ves. 153; and see Scott v. Nesbit, 3 Bro. C. C. 475.

(*o*) See Executors of Fergus v. Gore, 1 Sch. & Lefr. 350.

(*p*) Morrice v. Bishop of Durham, 11 Ves. 57, overruling Watson v. Birch, 2 Ves. jun. 51. S. C. 4 Bro. 172.

(*q*) Chatham v. Grugeon, 5 Ves. 86.

(*r*) Watson v. Birch, 4 Bro. C. C.

(*s*) Watson v. Birch, 4 Bro. C. C. 172. Anon. MS.

(*t*) Preston v. Barker, 16 Ves. 140.

(*u*) Anon. 2 Ves. jun. 268.

(*x*) Blackbeard v. Lindigreen, 1 Cox, p. 205.

(*y*) Ex parte Tilsley, in re Jones, a Lunatic, 22d Jan. 1818.

12. *Motion that Executor may file a Bill, or that Legatees may.*

If an Executor neglects to get in the Testator's Estate outstanding on Mortgage, an Order may be obtained by *Legatees*, that the Executor should file a Bill within a limited time, or in default, that the Legatees may be at liberty to file a Bill (z).

13. *Motion for leave to file new Interrogatories.*

AFTER a Defendant's Examination, on interrogatories, and Motion for Payment into Court on that Examination, the Plaintiff has nevertheless been permitted, on Motion to file further Interrogatories (a).

Master's Report.

A REPORT is a Master's Certificate to the Court of the facts or matters directed to be ascertained by him, or how, upon Examination, they appear to him, or of something which it is his duty to inform the Court of (b). A Report is necessary, in order to take notice of any thing in the Master's Office (c). If a 506*] Master to whom a Reference is made is incapable *of attending to the same, the matter will, on Motion, be referred to another Master (d).

A *Special Report* is never made unless by the direction of the Court; or where, from the difficulty of the subject, the Master thinks it proper.

Masters, in Reports which are special, do not set forth the Evidence with their opinions upon it, but only state the bare matter of fact for the Judgment of the Court, in the same manner as in Courts of Law, where they only state the facts allowed by both sides in a special Verdict, but never meddle with any part of the Evidence on either side (e).

The Master cannot proceed upon a Reference *de die in diem*, without an Order for that purpose (f); but the Order is not imperative on the Master; he may avail himself of it, or not, as circumstances passing before him call upon him, in the exercise of a sound discretion (g).

When the Master has heard both Parties he prepares a *Draft* of his Report, and at the request of either Party issues a War-

(z) *Graves v. Hughes*, MS. 24 Feb. 1813; and see *Elmalie v. M'Auly*, 3 Bro. C. C. 626.

(a) *Hatch v. —*, 19 Ves. 116. See ante, p. 500.

(b) See *Har. Pract. Newl. Edit.* p. 478.

(c) *Fox v. Macreth*, 1 Ves. jun. 69.

(d) *Anon.* 9 Ves. 341.

(e) *Duchess of Marlborough v. Sir Thomas Wheat*, 1 Atk. 453.

(f) *Purcell v. M'Namara*, 11 Ves. 362, overruling *Lingham v. Sturdy*, 5 Ves. 423; and see 1 Ves. jun. 69.

(g) *Purcell v. M'Namara*, 11 Ves. jun. 363.

rant that the Parties, or some of them, do again attend him, who have liberty to peruse and take a Copy of the Report, and after that, either Party may again attend the Master, and take out a Warrant to *settle* the Report, which the Master will do, unless either Party brings in *objections* in Writing to the Draft of the Report, and takes out a Warrant to be heard thereupon; and then the Master decides upon the objections, and **settles* [*507 his Report, after which no Evidence is admitted (*h*). After the Report is settled, either Party may take out a Warrant to attend the *signing* of the Report. The Report may be signed after the Plaintiff's death (*i*).

If the Report is not objected to, it is taken to be correct (*k*); and a Motion may be made to confirm the same *nisi*, which afterwards, on another Motion, will be made *absolute* (*l*).

Although the Master's Report is *confirmed*, the Court will, on a special application for that purpose, order it to be *reviewed* (*m*); but not if it has been followed by a Decree containing consequential directions, so long as the Decree stands (*n*); a Bill of Review must in such case be resorted to (*o*); but errors in computation merely, may be set right at any time (*p*).

By a standing Order made by the *Lords Commissioners* in 4 *Wil. & Mary*, it was directed that "all Reports should be filed within four days after the making, otherwise no Decree, Order, or Proceeding to be had thereupon;" but this Order is not literally adhered to; and it is sufficient if the Report be filed before any Proceedings or Order is made thereupon (*q*).

*If the Report be objectionable (unless the same was [*508 by the consent of the Parties in Writing, and stated so in the Report) (*r*), either Party may *except* to the same upon making a Deposit with the Registrar, and the Exceptions will be determined by the Court; but filing Exceptions without setting them down to be argued is no cause against confirming a Report (*s*).

Exceptions to a Master's Report of an insufficient Answer must be filed within eight days after the Service of a Subpœna for the Costs of such Answer (*t*). *Subpœnas* for Costs, and for a better Answer, may be awarded and served as soon as the Report, or the Certificate of the Answer, being insufficient, is

(*h*) Newl. Harr. p. 479, and 7 Ves. 587, there cited.

(*i*) See Case mentioned in *Morgan v. Scudamore*, 3 Ves. 197; and see 2 Ves. jun. 317.

(*k*) *Da Costa v. Da Costa*, 3 P. Wms. 142.

(*l*) See ante.

(*m*) *Vallence v. Weldon*, 1 Dick. 290, stated from the Registrar's Book, 1 Madd. Rep. 340. *Pennington v. Lord Mulcaster*, *ibid.* p. 555.

(*n*) *Turner v. Turner*, 1 Swanst. 154.

(*o*) *Perry v. Phelps*, 17 Ves. 183.

(*p*) *Hawkins v. Day*, 1 Ves. 184. *Weston v. Haggerston*, Coop. 134.

(*q*) *Eyles v. Ward*, 2 P. Wms. 517.

(*r*) ——— *v. Darnford*, 17th Feb. 1806. MS.

(*s*) *Abel v. Nodes*, 2 Cox, 169. S. C. 2 Dick. 730.

(*t*) See Order of Lord Keeper Finch, *Beames's Orders*, &c. p. 258.

signed (u). If a strong Case is made, the Court will allow exceptions to be taken *nunc pro tunc* to a Master's Report of an insufficient Answer, though the usual time for taking such Exceptions has elapsed, and a Plea and further Answer put in, and the Plea disallowed (x).

Where a Reference was made to the Master as to the Title, and he reported that *A. B.* with the concurrence of *C. D.*, &c. could make a good Title, the *Master of the Rolls* intimated an opinion that the Master had exceeded his Authority, having reported upon the Conveyance instead of the Title, and though the Report was not excepted to, but confirmed, still it must be considered as a nullity (y).

509*] *When the Master by his Report finds a fact, and his judgment is founded on Evidence, he delivers a Draft of his Report before he signs it, that the Parties may take objections; without which, unless by special Order (z), they are precluded from excepting (a).

Where the Party who took Exceptions did not lay a material piece of Evidence which he had then in his power before the Master, to which the error in the Master's Report was owing, the Court would not direct the Master to review his Report upon any other terms than the Exceptant's giving up his Deposit (b).

Where the Reference to the Master is to see whether an Answer, Examination, or Deposition is pertinent or impertinent, the Master's Judgment is founded merely on his conception of the matter. These Reports are not confirmed; he issues no Draft to ground objections; but the Party takes Exceptions to the Report in the first instance (c).

So where a Report is made under an Order of Reference to the Master to inquire, and state his opinion, whether an Infant is a Trustee or Mortgagee within the Statute 7th Anne;—or to approve of a Guardian;—or to make an allowance for Maintenance (d), Exceptions do not lie to such Reports; but the Report is stated, and brought before the Court by Petition, and 510*] the Court will confirm or vary it, according as it coincides in, or differs from, the opinion of the Master (e).

If a Decree has directed Costs, and the Master has not taxed them, an Exception will lie; but if he has proceeded upon the Costs, and has not allowed items which are claimed (f) or allowed, or items which ought not to have been claimed, his Re-

(u) Harrison, Edit. by Newland, p. 204.

(x) Noel v. Ward and another, 1 Madd. Rep. 339.

(y) Lewis v. Loxham, 1 Meriv. 179.

(z) Pennington v. Lord Mulcaster, 1 Madd. Rep. 555.

(a) See Ex parte Bux, 2 Ves. 339.

(b) Hedges v. Cardonel, 2 Atk. 408.

(c) Registrar's Statement of the Practice in Price v. Shaw, 2 Dick. 732, 3.

(d) As to Maintenance, see Ex parte Nicholls, 1 Bro. C. C. 577.

(e) See Statement of Practice in Price v. Shaw, 2 Dick. 732, 733.

(f) 6 Ves. 417.

port cannot be excepted to, but there must be a Petition, pointing out the particular grievance, and praying leave to except (g). Nor will exceptions lie to a Report as to Costs, though joined with other matters of exception. Resort must, in such case, be had to a Petition (h).

Upon arguing the Exceptions, no Evidence is admitted in support of the same but what was laid before the Master upon the objections (i).

The Plaintiff may take Exceptions to the Master's Report, and at the same time set down the cause for *further directions* (k).

If the Master by his Report states that he cannot take the Account which has been directed, this is the subject of *further directions*, rather than of Exceptions (l).

If the Exceptant prevails in any of the Exceptions he is entitled to the Deposit (m).

*Where one general Exception is taken to the Master's [*511 Report, including several distinct matters, and the Report appears right in any one instance, the Exception must be overruled (n).

Exceptions to the Master's Report, under a Decree made at the Rolls, may (o), or rather ought (p), to be set down before the Lord Chancellor; but, under special circumstances, the Chancellor will order them to be transferred to the Master of the Rolls (q).

Though, where Exceptions are taken to the Master's Report of a good Title, on a Bill for a Specific Performance, it is usual, in the Exceptions, to state the particular objections insisted on, yet it seems that any objection to the Title may be taken on the *arguing* of the Exceptions (r).

If the Master by his Report certifies that the Defendant has *submitted* to any thing, and the Defendant excepts, and insists that he made no such submission, an Affidavit is necessary on his part to falsify what has been certified; for though there is no reason that the Master's Report should be arbitrary and conclusive, yet it will be presumed, *prima facie*, to be true, and it rests on the other side to show the contrary (s).

If Exceptions be vexatious, Costs will be given beyond the Deposit.

A Petition lies to rehear Exceptions.

(g) See Pitt v. Mackreth, 3 Bro. 321. Purcell v. Macnamara, 12 Ves. 170.

(h) Lucas v. Temple, 9 Ves. 299, which seems to overrule Holbecke v. Sylvester, 6 Ves. 417: and see Hunt v. Fowneson, 9 Ves. 70.

(i) Primrose v. Bromley, cited Newl. Har. 480.

(k) Yeo v. Frere, 5 Ves. 424.

(l) Lupton v. White, 15 Ves. 436.

(m) Parker v. Front, 4 Bro. C. C.

(n) Hodges v. Salomons, 1 Cox. 249.

(o) Burdon v. Burdon, 9 Ves. 499.

(p) See Fritwell v. Kay, 2 Dick. 605.

(q) Ibid.

(r) Abell v. Heathcote, 4 Bru. C. C. 232.

(s) Allen v. Pendlebury, in note B. 3 P. Wms. 142. See on this point what is said in East India Company v. Keighley, 4 Madd. Rep. 1.

512*] *The Master, whenever any subject occurs in which he wishes to have the Examination of a Witness, is authorized to take such Examination, and a *Subpœna* issues for that purpose (t). If he sees cause to direct a Commission into the Country, he does not direct it, but certifies it is necessary (u). The *Subpœna* to a Witness to be examined before the Master is worded in the same way as that used to bring a Witness before the Examiner; it is oddly expressed; the *Label* explains the purpose (x); the old course in *Chancery* (y) was the same as that of the Court of *Exchequer*, the *Duchy Court of Lancaster*, and other Courts of Equity; viz. to insert in the Decree that the Master is armed with a power to examine Witnesses. That, however, is not now inserted in the Decrees of this Court; but, instead of that, the Master certifies that a Commission is necessary, and then the Commission issues of course (z).

Depositions in these Cases, taken in the Country, when returned, are filed by the Six Clerks; but Depositions taken before the Masters are kept in their Offices (a).

A Commission for the Examination of Witnesses, to falsify an examination of a Party before a Master, cannot be had without the usual Certificate from the Master of the necessity of such a Commission (b).

*513] Under the usual Decree for an Account on a Bill *filed by Creditors, the Master refused to proceed upon the Claim of the surviving Partners of the Testator, in respect of a Debt alleged to be due to them on the Balance of certain Dealings between the Partnership and the Testator in his separate capacity; but on a Motion to be admitted to go in before the Master, and prove this Debt under the Decree, it was referred to the Master to take the Account (c). If there be settled Accounts, and it is necessary to ascertain whether or not the Accounts have been settled, a Bill must be filed, or the Question submitted to the Court by way of Motion, upon Affidavits (d).

When a Person is once examined before the Master, he cannot be re-examined, without an Order for that purpose (e).

A Witness examined in the Cause, cannot be re-examined before the Master, without an Order for that purpose (f), and then, not to any matters he had before been examined to, or in

(t) *Parkinson v. Ingram*, 3 Ves. 606.

(u) *Ibid.* p. 607. *Paynter v. Houston*, 3 Meriv. 303.

(x) 3 Ves. 608.

(y) *Ibid.* 607.

(z) *Sanford v. Biddulph*, 9 Ves. 36.

(a) *Parkinson v. Ingram*, 3 Ves. 607.

(b) *Bearcroft v. Berkley*, 2 Cox. 108.

(c) *Paynter v. Houston*, 3 Meriv. 297.

(d) *Ibid.*

(e) *Cowlade v. Cornish* 2 Ves. 270. See *vid.* *Ex parte Saunderson*, 2 Cox. 196.

(f) *Sawyer v. Bowyer*, 1 Bro. C. C. 338. S. C. 2 Dick. 639; and see what is said of that Case, 2 Dick. 751. *Greenaway v. Adams*, 13 Ves. 360. *Smith v. Althus*, 11 Ves. 565. *Birch v. Walker*, 2 Sch. & Lefr. 518. *Vaughan v. Lloyd*, 1 Cox. 312.

which he may be interested, and the Master settles the interrogatories (*g*), who in so doing will take care that the same Witness is not a second time examined to the same facts, not only to prevent the Parties being loaded with unnecessary expense by useless Depositions, but also to avoid the danger of Perjury, which would be incurred by a Witness deposing a second time to the same Fact, after having seen where the *Cause [**514*] pinched, and how his testimony bore upon it (*f*). If he has been merely examined as a Witness to a Deed, or some such matter, the Interrogatories need not be settled by the Master, as it is evident then that he is not to be examined to the same matter (*g*). If the Witness has been examined only to trifling facts in the Cause, or if, in truth, he knows more than he has been already examined to, it seems he may be examined again (*h*).

Although it is an order of course to examine a Defendant *de benne esse*, saving just exceptions, yet where the Cause is heard, and it appears, such Defendant is a Party interested, it was held that Cause should have been shown against such an Order before the Witness was examined (*i*).

Testimony in the Cause, though not read at the hearing, may be received by the Master. As where on a Bill for an Account a Witness was examined before the hearing, whilst she was interested, but after the hearing she released her Interest, and was re-examined before the Master (*k*); for when the Court directs an Inquiry into a fact, it is in the nature of a new Issue joined; and what will be Evidence in any other Case will be evidence before the Master (*l*).

The Master may admit Depositions taken in a former Cause between the same Parties, without an *Order for that [**515*] purpose (*m*), and Depositions in a Cross-cause, though the Bill was dismissed (*n*). If Evidence is improperly admitted, Exceptions may be taken (*o*).

Where Parties go before the Master upon a Reference he must receive Interrogatories from both, though one of them should not have gone into any proof in the former stage of the Cause (*p*).

Interrogatories for the Examination of a Party are settled by the Master, and not, as in the case of a Witness, by Counsel (*q*). It is not necessary, in any case, that Examinations should be signed by Counsel (*r*).

(*g*) *Browning v. Barton*, 2 Dick. 506.

(*f*) *Vaughan v. Lloyd*, 1 Cox. 313.

(*g*) *Birch v. Walker*, 2 Sch. & Lett. 518.

(*h*) *Vaughan v. Lloyd*, 1 Cox. 313.

(*i*) *Glover v. Faulkner*, 1 Vern. 452.

(*k*) *Callow v. Mince*, 2 Vern. 472.

(*l*) *Smith v. Althus*, 11 Ves. 564.

(*m*) *Anon.* 3 Atk. 524.

(*n*) *Lubiere v. Geriam*, 2 Ves. 579.

(*o*) *Anon.* 3 Atk. 524.

(*p*) *Hough v. Williams*, 2 Bro. C. C. 190.

(*q*) *Purcell v. Macnamara*, 17 Ves. 434.

(*r*) *Bonus v. Flack*, 18 Ves. 267.

If a Defendant be in Custody for want of his Examination he is discharged immediately upon putting it in, but if, on reference, it proves insufficient, the Plaintiff, if he has not accepted the Costs of the Contempt, may proceed from the last Process (s).

If the Examination on Interrogatories before the Master is satisfactory to him, but not to a Party in the Cause, an Order may be obtained referring the Examination back to the Master, to look into it and see if it is sufficient, and if he reports it sufficient, an Exception may be taken, stating generally that the Master had reported the Examination to be sufficient, whereas he ought to have reported it insufficient (t).

516*] *A Guardian has been appointed for the Defendant who was incapable to put in his Examination (u).

Examinations of the Defendants, Executors, to Interrogatories exhibited by the Plaintiff, a Co-executor, under a Decree to account, taken by Commission, and returned to the Six-Clerks Office, being for the benefit of all Parties, the other Defendants, Creditors and Legatees, were held entitled to the benefit of them, and to take Copies (x).

After the Master has settled his Report no further Evidence is admissible (y).

In an Account against an Executrix, the Master was directed to allow Items, as to which it was verified by Affidavit, that the Vouchers were impounded, in the Ecclesiastical Court; it being the habit of that Court not to give up any thing Impounded, and the Expense of having the Officer attend the Court with the Vouchers being considerable (z).

A Party in his Examination may charge and discharge himself in the same sentence, but not in different sentences (a).

Where an Account furnished by a Party before any Suit is instituted is produced to charge him with the several Items on the Debit side, he is entitled to resort to the Credit side in support of his discharge (b).

517*] An Exception, it has been held, will not lie to the *Master's Certificate of having settled Interrogatories; but such Interrogatories must be put to the Witnesses, who answer, as much, or as little as they please, and then the Master certifies whether the Examination is, or is not, sufficient, and Exceptions may be taken to that Certificate (c). In other Cases, however it has

(s) Bonus v. Flack, 18 Ves. 187.

(t) Purcell v. Macnamara, 12 Ves. 166.

(u) Attorney-General v. Waddington, 1 Madd. Rep. 321.

(x) Dyott v. Anderton, 3 Ves. & Bea. 176.

(y) Thompson v. Lambe, 7 Ves. 587.

(z) Neilson v. Cordell, 8 Ves. 146.

(a) Kirkpatrick v. Love, Amb. 589; and see Blount v. Burrow, 1 Ves. jun. 546.

(b) Boardman v. Jackson, 2 Ball & Bea. 382.

(c) Paxton v. Douglas, 16 Ves. 248. Staniford v. Tudor, 2 Dick. 548.

been held, that objections to Interrogatories settled by the Master *may* be taken by *Exceptions* (d).

Where there is a general direction in a Decree to examine on Interrogatories before the Master, as the Master shall direct, if the Party has been examined on one set, and afterwards there should arise another matter, on which the Master thinks it proper to be examined, it is in the Judgment of the Master, whether, and at what time, and how often, he thinks fit that the Defendant should be examined; nor is a new Order necessary as in the case of a Witness (e).

The Defendant, on a Bill for an Account, will be discharged on his Oath as to Sums under 40s. but a Party cannot, by way of charge, charge another Person so (f).

Further Directions.

AFTER the Master's Report is confirmed, the Cause is, on a Petition for that purpose by either Party, set down for further directions.

*In order to *add* any thing to a Decree, the consequence of any proceeding which the Decree had directed, the Cause must be set down for further directions. To *alter* the Decree itself in the minutest particular the Cause must be reheard (g), unless it be in the case of a *Charity* (h). So, an Order made upon further directions is a decretal Order, and cannot be discharged on Motion, and its being by consent will make no difference. If, even by a clerical misprison, any thing was inserted in the Order, as by consent, to which the Party had not consented, it must, it seems, be rectified by a *Bill of review*, and cannot be done by Motion (i).

A Cause may, in strictness, be set down for further directions, or upon the Equity reserved, before the Lord Chancellor or the Master of the Rolls, without regard to the circumstance where it was heard originally; though it is very inconvenient (k).

If Interest is not given as it ought to have been, by the Decree, or reserved, it is, strictly, a matter of rehearing; but if the point is made upon a hearing for further directions, it may be given (l); for in that state of the Cause the Court may, as before observed, on further directions, add to the Decree as by giving Interest, which was not reserved (m).

(d) *Hughes v. Williams*, 6 Ves. 459.

(e) *Cowlade v. Cornish*, 2 Ves. 270.

(f) *Everard v. Warren*, 2 Chan. Cas. 249.

(g) *Lord Shipbrooke v. Lord Hinchinbrook*, 13 Ves. 394.

(h) *Attorney-General v. Whiteley*, 11 Ves. 241.

(i) *Anon.* 1 Ves. jun. 93.

(k) *Pemberton v. Pemberton*, 11 Ves. 53.

(l) *Creuze v. Hunter*, 4 Bro. 318.

Sammes v. Rickman, 2 Ves. jun. 36.

Goodyere v. Lake, Amb. 584.

(m) 2 Ves. jun. 164.

**Supplemental Bill.*

If any Property or Right in Litigation vested in a Plaintiff is transmitted to another by *Deed, or operation of Law*, the Person to whom it is transmitted is entitled to supply the defects of the Suit, if it become defective merely, and to continue it, or at least to have the benefit of it, if abated. It seems also clear, that if any Property or Right before vested in a *Defendant* becomes transmitted to another, the Plaintiff is entitled to render the Suit perfect if become defective, or to continue it if abated, against the Person to whom that Property or Right is transmitted (n). This leads to the consideration of Supplemental Bills and Bills of Revivor. We shall first treat of Supplemental Bills.

Supplemental Bills are necessary, either 1st. In respect of some defect in the original Bill, or in some of the Proceedings upon it; or, 2dly. In respect of new Evidence discovered, or of some event occurring subsequent to the filing of the Bill, which gives a new interest in the matter in dispute to a person who is not a Party to the Bill.

But though a *Supplemental Bill*, properly so called, is a Bill brought in respect of new matter arisen since the filing of the original Bill, and before the original comes to a hearing (o), yet such a Bill may be filed to *add Parties*, where the Proceedings are in such a state that the original Bill cannot be amended 520*] for that purpose (p); or to obtain a further discovery, *or put new matter in Issue, and this may be done before or after a Decree; and the Bill may be either in aid of the Decree, that it may be carried fully into execution, or that proper directions may be given upon some matter omitted in the original Bill, or not put in Issue by it (q), or by the Defence made to it; or to bring formal Parties before the Court (r).

Supplemental Bills are often brought in aid of a Decree, as on a Decree to account, for want of full direction before; and directions are given upon the Supplemental Bill, that the new matter should be connected with the former Decree (s).

A Supplemental Bill may be filed even after a Cause has been heard, and an Account directed, for a discovery of more Evidence touching a matter of Account (t); but where a Supplemental Bill is brought *after Publication*, it is irregular to examine Witnesses to a matter that was in Issue, and not proved in the original Cause, nor can such proofs be read; and if there

(n) Redesd. Tr. Pl. 48.

(o) Jones v. Jones, 3 Atk. 217.

(p) Redesd. Tr. Pl. 59, who cites 3 Atk. 370; but see 3 Atk. 817, and Anon. MS.

(q) See 3 Atk. 110.

(r) Redes. Tr. Pl. 49, 3d edit. and the Cases there cited; and see ibid. 263.

(s) Dormer v. Fortescue, 3 Atk. 133.

(t) Boeve v. Skipwith, 2 Ch. Rep. 142. S. C. 1 Eq. Abr. 80.

be no proof as to the new matter in the Supplemental Bill it will be dismissed (u).

By an Order of *Lord Hardwicke* (x) no Supplemental or new Bill in nature of a Bill of Review, grounded upon any new matter discovered, or pretended to be discovered, since the pronouncing of any Decree of the Court, in order to the reversing or varying of such Decree, can be exhibited without the special leave of the Court first obtained for that purpose,* and [*521 unless the Party exhibiting the same do first deposit with the Registrar of the Court so much Money, as, together with the Deposit by the Rules of the Court to be made, on obtaining a re-hearing of the Cause wherein such Decree was pronounced, will make up the sum of Fifty Pounds, as a pledge to answer such Costs and Damages as shall be awarded to the adverse Party, in case the Court shall think fit to award any at the hearing of the Cause on such Supplemental or new Bill (y).

Diligence forms an ingredient in the mind of the Court on Application made for leave to file Supplemental Bills, on the ground of Evidence having been newly discovered (z).

When any event happens subsequent to the filing of the original Bill, which occasions any alteration in the interest of any of the Parties to the Suit, and does not deprive a Plaintiff of all interest in the subject, as in the case of a Mortgage, or if an event occurs which gives a new interest in the matter in dispute to any Person not a Party to the Bill, as the birth of a Tenant in Tail, or by the happening of any other Contingency, the defect may be supplied by a Supplemental Bill.

Where a Bill claims against the first Tenant in Tail in being, a charge upon the whole Inheritance, which is in strict Settlement, if the Tenant in Tail dies without Issue, all the proceedings may, by a Supplemental Bill, be had against the second Son, as if he had been a Party to the original Bill (a).

*A Supplemental Bill in the nature of a Bill of Review [*522 may be filed, containing new matter discovered since the filing of the original Bill, and a Decree not signed and enrolled, together with a *Petition of Rehearing*, in the nature of a Bill of Review, praying that the former Decree may be rectified in the particulars complained of by the Supplemental Bill (b); it is necessary to obtain leave of the Court to file such Bill; and the same Affidavit is required for this purpose as is necessary to obtain leave to file a Bill of Review on Discovery of new matter (c).

(u) *Bagnal v. Bagnal*, Vin. Abr. tit. Chancery (R. A.) Ca. 8, 9.

(x) Anon. 11th Oct. 1741. MS.

(y) *Atwell v. Montgomery*, 3 Atk. 138.

(z) *Barrington v. O'Brien*, 1 Ball & Beatty, 142.

(a) *Lloyd v. Johns*, 9 Ves. 58.

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(b) *Standish v. Radley, Barnard*, 463. S. C. 2 Atk. 177. 2 Atk. 40; and see *Goold v. Tankard*, 3 Atk. 35. *Lord Effingham v. Lord Portsmouth*, 1 Ves. 430. *Moore v. Moore*, 2 Ves. 598.

(c) See *Redeas. Tr. Pl.* 82.

Upon a Supplemental Bill in nature of a Bill of Review of a Decree, not signed and enrolled, upon the alleged discovery of new matter, it has been said, (d), that if the Defendant can show that the allegation is false, he must do so by Plea, and that it is too late to insist upon it by Answer; but as the Bill must allege the fact of Discovery; and that fact must be the ground of the Proceeding, it seems equally liable to a Traverse by Answer, and by Evidence, as any other fact stated in the Bill (e).

Though by the 8 & 9 Wil. 3, c. 11, s. 7, a Suit does not abate upon the death of one Defendant, but may go on against the others, yet it must be with this restriction, viz. that the subject matter of the Bill is not hurt by the death of such Defendant (f).

523*] *Where the Plaintiff, a Feme Sole, married after the Suit was instituted, and a Settlement was executed, assigning all her Right and Interest to Trustees for her and her Issue, a Supplemental Bill was considered as necessary (g).

So, if a Plaintiff becomes Bankrupt, his Assignees may file a Supplemental Bill (h), or rather an original Bill in the nature of a Supplemental Bill (i). But where a small sum of Money (50*l.*) had been decreed to be paid to the Bankrupt, the same, on Petition by the Bankrupt and his Assignees, was ordered to be paid to the Assignees, without a Supplemental Bill (k); and though Assignees do not file a Supplemental Bill, the Bill, it has been held, could not be dismissed (l).

If a Plaintiff becomes a Lunatic, a Supplemental Bill may be filed in the joint names of the Lunatic and of the Committee of his Estate (m). So, if a Party Defendant becomes a Lunatic, a Supplemental Bill must be filed against the Lunatic and his Committee; and if the Committee be afterwards changed, the new Committee, on Motion, will be ordered to be substituted, as a Defendant in the place of the old Committee (n).

524*] *If a Bill be filed by an Administrator *durante minore ætate*, and the Infant attains Twenty-one, though just before the hearing of the Cause, there must be a Supplemental Bill (o).

(d) 2 Atk. 40; but see the observation on this Case Redead. Tr. Pl. 236, in note (x.)

(e) Redead. Tr. Pl. 237. 3d edit.

(f) Brown v. Higden, 1 Atk. 291.

(g) Merewether v. Mellish, 13 Ves. 435.

(h) Williams v. Kinder, 4 Ves. 387. See 1 Atk. 263. Comyn's Reports, 590.

(i) Redead. Tr. Pl. p. 51.

(k) Setcoole v. Healey, 2 Bro. C. C. 322.

(l) Sellers v. Dawson, 2 Dick. 738. S. C. 2 Anstr. 458; but see Davison

v. Butler, 1 Co. Bank. Law, 575, 6th edition; and Boddy v. Kent, 1 Meriv. 363, &c. where Sellers v. Dawson is observed upon, and it was held, that the Order of Dismissal in that Case was obtained irregularly, but could not be considered as a nullity until set aside.

(m) See Brown v. Clarke, 3 Wood. Lect. 378, in note, where the form of such a Bill is noticed.

(n) Johnson v. Legard, MS. 2d March 1816.

(o) Stubbs v. Leigh, 1 Cox, 133.

And where Assignees of a Bankrupt die, or are discharged, and others are put in their room, they cannot *revive*, but must file a *Supplemental Bill*, to entitle them to the benefit of Proceedings in a former Suit (p).

Where a *Supplemental Bill* after a Decree brings a new Person or a new Interest before the Court, it is open to the Parties to make any objection to the Decree, that might have been made at the first hearing (q).

A Purchaser, *pendente lite*, may file a *Supplemental Bill*, and comes into Court *pro bono et malo*, and is liable to all Costs in the Proceedings from the beginning to the end of the Suit (r).

A Tenant in Tail, claiming upon the death without Issue of a preceding Tenant in Tail, not through or under him, but as a Remainder-man, is entitled to continue the suit of the former Tenant in Tail, and to the Benefit of the Proceedings, by a *Supplemental Bill* (s).

Where a Bill is brought to have the Benefit of a former Decree, the Plaintiff cannot examine Witnesses, much less the same Witnesses to the matters in Issue in the former Cause; but on such a Bill *the Court may examine the justice of the [*525 former Decree; but then it must be upon the Proofs taken in the Cause wherein that Decree is made (t).

In general, on a Bill to carry a former Decree into execution, the Court can only do that, and not vary it; but there are instances where the Court has considered the Directions, and whether there was any mistake, especially as between new Parties (u).

If a *Supplemental Bill* is brought against a Person, not a Party to the original Bill, praying that he may answer the original Bill, and no reason is suggested why he could not be made a Party to the original Bill by Amendment, he may demur (x).

If a *Supplemental Bill* is brought upon matter which arose before the original Bill was filed, and this is not apparent on the Bill, the Defendant may plead that Fact (y).

A *Supplemental Bill* must state the original Bill, and the Proceedings thereon: and if the *Supplemental Bill* is occasioned by an event subsequent to the original Bill, it must state that event, and the consequent alteration with respect to the Parties; and, in general, such Bill must pray that all the Defendants may appear, and answer to the Charges it contains. For, if the *Supplemental Bill* is not for a Discovery merely, the Cause must be heard upon the *Supplemental Bill*, at the same time that it is heard upon the original Bill, if it has *not been [*526

(p) Anon. 1 Atk. 88. S. C. ibid. 571.

(q) Hill v. Chapman. 3 Bro. C. C. 392.

(r) Anon. 1 Atk. 88. S. C. ibid. 89.

(s) Lloyd v. Johns, 9 Ves. 37.

(t) Johnson v. Northey, 2 Vern. 409; and see West v. Ship, 1 Ves. 245.

(u) West v. Ship, 1 Ves. 245.

(x) 3 Atk. 817.

(y) Redesd. Tr. Pl. 234. 3d edit.

before heard ; and if the Cause has been before heard, it must be further heard upon the Supplemental Matter (y).

Bill of Revivor.

If any of the Parties to a Suit, Plaintiffs or Defendants, die, or if a Feme Sole Plaintiff marries (z), (it is different if a Feme Sole Defendant marries) (a), regularly, the Suit *abates*, and a Bill of Revivor is necessary ; but though a Feme Sole pending the Suit marries, yet if the Cause proceeds, and a Decree is made, this is not a sufficient ground to reverse the Decree (b) ; and where in a Bill of Revivor the Plaintiff omitted to make one Defendant a Party, it was held no ground for a Re-hearing, the Proceedings having been in such Defendant's name (c). An abatement by death is occasioned only by the death of such as are so far material Parties, and concerned in interest, as to make it necessary to have their Representatives before the Court previous to a final Determination of the Cause (d).

If the Interest of a Party dying so determines that it can no longer affect the Suit, and no Person becomes entitled thereupon to the same Interest, which happens in the case of a Tenant for Life, or a Person having a temporary or contingent [527*] interest, or an *interest defeasible upon a Contingency, the Suit does not abate so as to require any Proceeding to warrant the Prosecution of the Suit against the remaining Parties ; but if the Party dying be the only Plaintiff, or sole Defendant, there may be necessarily an end of the Suit, no subject of litigation remaining. If the whole Interest of a Party dying survives to another Party, so that no Claim can be made by or against the Representatives of the Party dying, as if a Bill is filed by or against Trustees or Executors, and one dies, not having possessed any of the Property in question, or done any Act relating to it which may be questioned in the Suit, the Proceedings do not abate (e) ; as where two Joint-tenants file a Bill, and one of them dies (f). So in the case of Creditors suing on behalf of themselves, and all other Creditors ; if one Plaintiff dies, the Suit does not abate, because the Representatives of the deceased Plaintiff may come in under the Decree in Common with the other Creditors (g). A Creditor, who comes in before the Mas-

(y) Redesd. Tr. Pl. 69, who cites 3 Atk. 217.

(z) Durbaine v. Knight, 1 Vern. 318. Wharam v. Broughton, 1 Ves. 182.

(a) Ib. ; and see Abergavenny v. Abergavenny, Vin. Abr. tit. Baron and Feme, J. A. pl. 20.

(b) See Cranborn v. Dalmahoy, 2 Freem. 109. S. C. 1 Dick. 3. Cranborn v. Dalmahoy, 1 Chan. Rep. 231. Nels. 86.

(c) Peachy v. Vintner, Chan. Rep. 252.

(d) See Finch v. Winchelsea, Eq. Cas. Abr. 2 Eq. Cas. Abr. n. 1, in marg.

(e) Redesd. Tr. Pl. 46. 3d edit.

(f) 3 Ch. Rep. 66. *Sic dict.* in Fellows v. Williamson, 11 Ves. 309, and in Boddy v. Kent, 1 Meriv. 364.

(g) Boddy v. Kent, 1 Meriv. 364.

ter on the Creditor's Bill, may revive (*h*). *Sed quare*, whether on a Bill by some Creditors in respect to their several Demands, but not on behalf of *all* the Creditors, if one of the Plaintiffs dies, there is an Abatement (*h*)? So, it seems, if there be a Suit for a Legacy against Baron and Feme, the latter being *Ex- [*528 ecutrix of the Testator, and the Baron dies, the Suit does not abate (*i*).

In like manner, if a Bill be filed by Husband and Wife, for a demand in right of the Wife, and the Husband dies, it is considered as in the nature of a *Chose in Action*, and survives to her, and the Suit does not abate (*k*). So if a promise is made to Husband and Wife, and they file a Bill, and the Wife dies, the Suit does not abate (*l*), because the whole interest survives to the Husband.

A Suit is not abated by the Death or Outlawry of a *Relator*, but in such case the Court suspends further Proceedings until another Relator is appointed (*m*).

If a Decree has been assigned and enrolled it ought to be revived by *scire facias* (*n*); but where there were Proceedings relating to Costs, &c. after the Decree was enrolled, which the *scire facias* would not revive, the Court held a mere Bill of Revivor to be proper (*o*). An Assignee, it seems, cannot revive by *scire facias* (*p*); and indeed, in a distinguished Publication, it is said, that "the Enrolment of the Decrees being now much disused, it is become the Practice to revive, in all Cases, indiscriminately, by Bill" (*q*).

*A Plaintiff, however, on the death of a Defendant, is [*529 not obliged to bring a Bill of Revivor, but may file a *new Bill* if he thinks he can make a better Case than by the first Bill (*r*).

If a Defendant dies after the hearing of the Cause, but before Judgment, it is not necessary the Suit should be revived before Judgment is given (*s*).

Where one *Tenant in Common* dies, his Representative may revive (*t*), without making the surviving Tenant a Co-Plaintiff; but, in such case, he must make him a Defendant (*u*).

If a Cause has been heard on a Bill of *Interpleader*, and a

(*h*) Pitt v. Duke of Richmond, 1 Eq. Abr. 3.

(*i*) Ibid.

(*j*) Sheberry v. Briggs, 2 Vern. 249. *Sed vid.* Anon. 3 Salk. 84.

(*k*) Anon. 3 Atk. 726. 3 Ch. Rep. 40. 2 Freem. 133. *Sed vid.* Ld. Redd. Tr. Pl. p. 47. 3d edit.

(*l*) Cary, 88.

(*m*) See note to 1 Swanst. 305, where the Authorities are given.

(*n*) 1 Eq. Abr. 4, in margin, 1 Ves. sen. 185.

(*o*) 2 Ch. Rep. 67. S. C. 1 Eq. Abr. 4.

(*p*) Dunn v. Allen, 1 Vern. 46.

Sed vid. S. C. ibid. 283.

(*q*) Redesd. Tr. Pl. 54, 5.

(*r*) Spencer v. Wray, 1 Vern. 463.

Blount v. Doughty, 3 Atk. 486.

(*s*) Folkes v. Western, 9 Ves. 461.

S. P. Ashburnham v. Thompson, MS.

(*t*) The Suit becomes defective, *sed*

quare if abated. See *dict.* in Boddy

v. Kent, 1 Meriv. 364. *Sed vid.* 2

Ves. 232. 2 Bro. P. C. 523. 4 Bro. P.

C. 395.

(*u*) Fallows v. Wilkinson, 11 Ves.

313. *Sic dict.* Boddy v. Kent, 1 Meriv.

p. 364.

Trial at Law has been directed to settle the Rights between the Defendants, this puts an end to the Suit as to the Plaintiff; so that if he afterwards dies, no Revivor is necessary, each Defendant being in the nature of a Plaintiff (x).

If an Administrator obtains a Decree, but dies before Enrolment, the Administrator *de bonis non* may revive this Decree within the Equity of the Statute, called the *Oxford Act*. (y).

A Bill of Revivor of a Bill of Revivor lies (z).

If one be named in the *original Bill* who is yet alive, he ought not to be named in the Bill of Revivor, because the Suit never abated as to him; but if named in the Bill of Revivor only, he 530*] may be named in every *Bill of Revivor after, because he was not named Defendant in the original Bill (a).

If two Joint-Tenants exhibit their Bill, and one Releases, this will not abate the Suit as to the other (b).

It has been held, that Costs decreed to a Plaintiff or Defendant fall to the ground by the death of the Party, *before they are taxed* (c), and a Report made in the Life-time of the Party; for this is *actio personalis, et moritur cum persona* (d); but if taxed they become a Judgment Debt, and if the Party to whom they are given dies, they go to the Representative, who may revive for Costs only (e). Nor is a Cause out of Court for the purpose of Revivor, in consequence of the Bill being dismissed; nor is an enrolment of the Decree, necessary, to entitle the Representative of a Party to revive for Costs (f).

531*] If a Defendant be in Execution for Costs, and the *Plaintiff dies, the Chancellor, on application, will make an Order that the Representative should revive within a certain time, and if he does not, that the Defendant should be discharged (g).

Baron and Feme brought a Bill to redeem a Mortgage; the Defendants pleaded thereto, and the Plea was overruled, with

(x) Anon. 1 Vern. 352.

(y) Owen v. Curzon, 2 Vern. 287.

(z) Hardr. 201.

(a) Hard. 201, 2.

(b) 2 Freem. 6.

(c) Select Cases in Chancery, p. 21. Hall v. Smith, 1 Bro. C. C. 438. S. C. 2 Dick. 649. *contra*, Morgan v. Scudamore, 2 Ves. jun. 313. 3 Ves. 198. In — v. —, 22 Dec. 1818. M.S. the Vice Chancellor, on a Bill of Revivor for Costs, was of opinion with Lord Thurlow, that by a Decree giving Costs there was an inchoate right to the Costs when taxed; and when taxed, the Party was entitled to them by relation from the time of the Decree, just as at Law, Costs taxed relate to the Verdict; but there being a defect in the Bill, the Case did not call upon him to decide the point.

(d) Gilb. For. Rom. 181.

(e) White v. Hayward, 2 Ves. 462; and see Johnson v. Peck, *ibid.* p. 465. Edgil v. Browne, 1 Dick. 62; and see Redead. Tr. Pl. 164. 3d edit. where 1 Bro. C. C. 438 is cited. See also Lowten v. Mayor and Commonalty of Colchester, 2 Meriv. 116. In Thorn v. —, Select Cas. 54, the Lord Chancellor said there could be no Revivor for Costs, except where there was a Decree for an Account, but that Case is overruled by the before-mentioned Case of White v. Hayward. See Lowten v. Mayor of Colchester, 2 Meriv. 116.

(f) Lowten v. Mayor, &c. of Colchester, 2 Meriv. 116.

(g) White v. Hayward, before Lord Hard. noticed in Morgan v. Scudamore, 3 Ves. 197.

Costs. The Baron died, and it was held, the *Feme* by *survivorship* was entitled to the Costs (*h*).

If any thing remains executory in the Decree besides the payment of Costs, the Party may revive, though the Costs are not taxed; and that revives the right to Costs (*i*).

However it might have been in the time of *Lord Nottingham* (*k*), it is now a settled Rule, that where Costs are payable out of a Real Estate (*l*), or other particular Fund (*m*), or wherever any thing of a Duty is decreed (*n*), there may be a Revivor for them.

In the case of a Bill of Discovery and an Answer, and an Abatement by the marriage of a Female Plaintiff, there cannot, it seems, be a Revivor for Costs (*o*).

A Decree for a Sum against an Executor, with Costs out of Assets, is not a Decree in *Personam*, *but Executory; [*532 and if he dies the Plaintiff may revive against the Representative of the Testator, and pursue his Assets (*q*).

Where the Plaintiff brought his Bill against the Defendant's Father for Land, and revived it against the Defendant as Heir, and afterwards the Bill was dismissed with Costs, it was held, that the Defendant was not entitled to his Father's Costs, but that they died with him (*r*).

A Devisee (*s*), a Purchaser (*t*), or an Assignee (*u*), or one who claims only as Heir *per formam Doni* (*x*), cannot bring a Bill of Revivor, nor have such a Bill brought against them, there being a *want of Privity*; but in these Cases, an original Bill in the nature of a Bill of Revivor must be brought (*y*), upon which the Decree will be carried on in the same manner as it would have been on a Bill of Revivor, and no new Defence permitted (*z*).

Lord Hardwicke held that a *Defendant* could not revive but in one instance, i. e. after a *Decree to Account* (*a*), in which case both Parties are Actors, and either may revive (*b*); but from subsequent Cases it seems a Defendant or his Representative

(*h*) *Coppin v. —*, per Williams, 2 vol. p.

(*i*) *Johnson v. Peck*, 2 Ves. 465. *Blower v. Morret*, 3 Atk. 772.

(*k*) *Morgan v. Scudamore*, 3 Ves. 195. S. C. 2 Ves. jun. 313.

(*l*) 3 Atk. 772, 812. *Jenour v. Jenour*, 10 Ves. 572.

(*m*) *Ibid.* 3 Ves. 196. *Kemp v. Mackarel*, 3 Atk. 812. S. C. 2 Ves. 579.

(*n*) *Johnson v. Peck*, 2 Ves. 465; and see 2 Ves. 579.

(*o*) *Dodson v. Judd*, 10 Ves. 31.

(*q*) *Blower v. Morret*, 2 Atk. 773.

(*r*) *Lloyd v. Powis*, Nels. 147. S. C. 3 Ch. Rep. 65. *Temple v. Rouse*, 2 Ch. Rep. 7. 1 Dick. 16.

(*s*) 1 Ch. Ca. 174.

(*t*) 2 Freeman, 132.

(*u*) *Harrison v. Ridley*, Com. 539.

(*x*) *Osburn v. Usher*, Dom. Proc. 13th March. 1722.

(*y*) See *Lord Say and Sele*, Select Cas. Ch. 53.

(*z*) *Clare v. Wardell*, 1 Vern. 548.

Minshull v. Lord Mohun, 2 Vern. 672.

(*a*) *Anon.* 3 Atk. 691.

(*b*) *Lord Stowell v. Cole*, 1 Eq. Abr. p. 3. S. C. 2 Vern. 219, 296.— See 1 P. Wms. 263, and *Hollingshead's Case*, 1 P. Wms. 743. *Thorn v. Pitt*, Select Cases in Ch. 54. *Kent v. Kent*, Prec. Ch. 197.

(c) may *revive a Suit in every Case where he or they can derive a Benefit from the further Proceeding (d): the doubts formerly thrown out on this point seem to have arisen from a consideration of the inconvenience of drawing the Account of Assets (e). And where a Plaintiff filed a Bill of Revivor after a Decree, and the Defendant put in an Answer, but the Plaintiff did not obtain an Order to revive, on a Motion of the Defendant, the Plaintiff was ordered, within a week, to obtain an Order to revive, and in default, that the Defendant might draw up the Order to revive. Default was made, and at the expiration of the week, on the Motion of the Defendant, the Cause was ordered to stand revived (f).

When an Injunction Cause abates by the death either of the Plaintiff or the Defendant, the Rule is, that a Motion must be made to revive within a stated time, or that the Injunction may be dissolved (g); but a Defendant cannot revive merely for the purpose of dissolving an Injunction and proceeding at Law (h).

If an Order to dismiss has been obtained after an Abatement, although irregular, it is not to be regarded as a nullity; and such Order must be discharged before the Plaintiff can obtain an Order to revive (i).

534*] If a Bill of Revivor does not show a sufficient *ground for reviving the Suit, or any part of it, either by or against the Person by or against whom it is brought, the Defendant may, by Demurrer, show cause against the revival (k). If a Bill of Revivor is brought without sufficient cause to revive the Suit against the Defendant, and this is not apparent on the Bill, the Defendant may plead the matter necessary to show that the Plaintiff is not entitled to revive the Suit against him (l). And if the Plaintiff is not entitled to revive the Suit, though a Title is stated in the Bill, so that the Defendant cannot demur, a Plea may be resorted to (m).

It seems to have been thought, that a Defendant could only object to Revivor by way of Plea or Demurrer (n). "And" says *Lord Redesdale*, "there may be great convenience in thus making the objection; for if the Defendant objects by Answer merely, the point can only be determined by bringing the Cause regularly to a hearing; but if the objection is taken by Plea or

(c) *Kent v. Kent*, Prec. Ch. 197.
Thorn v. Pitt, Sel. Cas. 54.

(d) *Williams v. Cooke*, 10 Ves. 406; and see *Horwood v. Schmedes*, 12 Ves. 317. *Finch v. Lord Winchelsea*, 1 Eq. Cas. Abr. 2.

(e) See *Morgan v. Scudamore*, 3 Ves. 196, 198.

(f) *Gordon v. Bertram*, 1 Meriv. 154.

(g) *Select Cases in Chancery*, 24.
 (h) *Horwood v. Schmedes*, 12 Ves.

311.

(i) *Boddy v. Kent* 1 Meriv. 361.

(k) *Redesd. Tr. Pl.* 164, 3d edit. and the Authorities there cited.

(l) *Ibid.* 233, and who cites 3 P. Wms. 348.

(m) *Ibid.*

(n) 3 P. Wms. 348.

Demurrer, it may, in general, be immediately determined in a summary way" (o).

A Bill of Revivor should only contain so much new matter as is necessary to show the Right to revive (p); if it contains more, it is demurrable (q); and it should charge that the Cause ought to stand revived, and be in the same condition with respect to the Parties in the Bill of the Revivor, as it was in with respect to the Parties to the original Bill at the time *the Abatement happened; and it must pray that the Suit may be revived accordingly. It may be likewise necessary to pray that the Defendant may answer the Bill of Revivor, as in the case of a requisite admission of Assets, by the Representative of a deceased Party (r).

Although a Defendant has appeared, and answered the original Bill, yet if he cannot be found to be served with a Subpœna to answer a Bill of Revivor, the Plaintiff must proceed under the Statute 5 Geo. 2 c. 25, to have the Bill taken *pro confesso* (s). Service of the Subpœna to revive, on the Clerk in Court in the original Cause, will not, on Motion, be allowed (t).

It seems unsettled whether, if an original Defendant has had orders for time to answer the original Bill, he can begin again with the usual course of orders for time to answer in the revived Cause (u).

If the Defendant's time for answering the Bill of Revivor is out, viz. eight Days after Appearance, unless the Defendant has obtained an Order for further time, the Court, on Motion, will order the Proceedings to stand revived; as it will also, though the Defendant insists by his Answer that the Plaintiff is not entitled to revive; for this ought to be shown by Plea or Demurrer: but if it appears, at the hearing, that the Plaintiff had no Title to revive, he cannot have a Decree (x).

It seems that a Defendant, in a Bill of Revivor, *can- [*536 not plead a Plea which had before been pleaded by the original Defendant, and overruled (y); nor can he by Answer contest the justice of a Decree (z).

It appears to be unnecessary to revive against a Defendant who has not answered (a).

Where a Suit in Equity abates by the death of the Plaintiff, his Executor or Administrator must revive within six years, otherwise the Statute of Limitations may be pleaded, except where

(o) Redesd. Tr. Pl. 234. 3d edit.

(p) Com. Rep. 590.

(q) 2 Eq. Abr. in margin.

(r) Redesd. Tr. Pl. 70, 71.

(s) Henderson and others v. Meggs, 2 Bro. C. C. 127. James v. Dore, 1 Dick. 63.

(t) Brown v. Lee, 2 Dick. 545. Lee v. Warner, *ibid.* p. 546.

(u) Fallowes v. Williamson, 11 Ves. 306.

(x) Harris v. Poland, 3 P. Wms. 348.

(y) Samuda v. Furtado, 3 Bro. C. C. 70.

(z) Clare v. Werden, 2 Vern. 548. S. C. 1 Dick. 20.

(a) Oxburgh v. Fincham, 1 Verg. 308.

there has been a *Decree to account*, in which case a Bill of Revivor is considered in the nature of a *Scire Facias*, and not within, or barrable by, the Statute of Limitations (b).

Notwithstanding an Abatement by death, the Court sometimes, with the consent of all Parties interested (c), orders collateral things to be done, such as the delivery of Deeds and Writings, or Money to be paid out of the Bank, without a Revivor; but this is only done where the Court must deliver itself from the Custody thereof, some way or other and proceed *ex officio* (d).

Bill of Review.

WHEN a Decree is obtained, and the same is *enrolled*, the Cause cannot be re-heard upon *Petition*; and the Party grieved 537*] can in no case (not even where *the Decree was on a Bill taken *pro confesso* (e), or requires explanation) (f), set aside the Decree, or obtain relief against it by an original Bill, or collaterally, as by another Bill for the same Cause (g); for then the Decrees of the Court would be contradictory, which would breed the utmost confusion (h); the only remedy, therefore, in such case is by a Bill to set aside the Decree for *Fraud* (i), or a *Bill of Review*, which lies against those who were Parties to the original Bill, and against them only (k), and must be either for *Error apparent on the face of the Decree*, or upon *some new matter*, as a Release, Receipt, &c. proved to have been discovered since; for unless this Relief were confined to such new Matter, it might be made use of as a method for a vexatious Person to be oppressive to the other side, and for the Cause never to be at rest (l).

Any Errors apparent upon *Schedules*, or of Charge and Discharge appearing upon the Report, may be rectified without recourse to a Bill of Review; but no Affidavit introducing a new Fact will be permitted after an Enrolment of the Decree (m).

If the Decree has not been *enrolled*, the mode of proceeding is by a *Supplemental Bill*, in the nature of a Bill of Review (n).

(b) Hollingshead's Case, 1 P. Wms. 742.

(c) Beard v. Earl Powis, 2 Ves. 400.

(d) Wharron v. Broughton, 1 Ves. 185, 6. Finch v. Winchelsea, Eq. Ca. Abr. 2.

(e) See Ogilvie v. Herne, 13 Ves. 564.

(f) Vid. Head v. Hamley 1 Chan. Cas. 44.

(g) Earl of Darlington v. Pulteney, 3 Ves. 386.

(h) See Ogilvie v. Herne, 13 Ves. 564.

(i) 3 Atk. 811. For. 201.

(k) Earl of Carlisle v. Globe, Nels 52. S. C. 3 Ch. Rep. 94.

(l) See Curtis v. Smallbridge, 2 Freem. 178. Chan. Ca. 43. Taylor v. Sharp, 3 P. Wms. 371. Morris v. Le Neve, 3 Atk. 35.

(m) Weston v. Haggerston, Coop. 136.

(n) See Standish v. Radley, 2 Atk. 177. S. C. Barn. 463; and see Gartside v. Isherwood, 2 Dick. 614.

*Where there is Error on the face of the Decree, as if an absolute Decree be made against an Infant (*m*), the Bill may be filed without leave of the Court, and as it seems, may be filed by a Person not a Party to the original Decree, but whose Rights are injured by it (*n*); but where the Bill is filed upon Evidence come to the knowledge of the Party after Publication, and which he could not, by using reasonable, active diligence, have known, in such case a Petition to the Court for leave to file a Bill of Review, supported by a strong Affidavit, is necessary, together with a Deposit of 50*l.* (*o*).

It is always in the discretion of the Court, whether it will give leave to file a Bill of Review on the discovery of new Evidence; and where such Permission tended to deprive Creditors of the Payment of their Debts, the Court refused it (*p*).

The Errors complained of must be *Errors in Law*; nor can the Party upon a Bill of Review assign for Error, matter of *form* only (*q*), or of *abatement* (*r*), or that any of the matters decreed are *contrary to the Proofs in the Cause* (*s*).

A *Fact* misunderstood by the Court, and not *introduced [*539 into the Decree, may be a ground for an Appeal, but not for a Bill of Review (*t*).

In the time of *Lord Guildford* there was no limitation for a Bill of Review (*u*); but now, twenty years after a Decree (not the Enrolment), though error be apparent on the Record, the Court will not allow a Bill of Review (*x*), unless in favour of Infants, or Persons under the disabilities specified in the Statutes of Limitation (*y*).

A Person is not allowed to bring a Bill of Review unless he has performed the Decree, or will Swear he is unable to do it, and will surrender himself to the Fleet, to lie there till the matter on the Bill of Review is determined (*z*); if the Decree be for the Payment of Money, he must pay the Money, or give Se-

(*m*) Pract. Reg. 196.

(*n*) See *Chaworth v. Beech*, 4 Ves. p. 564.

(*o*) See *Young v. Keighly*, 16 Ves. 348. 2 Atk. 534. Anon. 2 P. Wms. 283. 1 Ves. 432. *Moore v. Moore*, 2 Ves. 284, 598. *Gould v. Tancred*, 2 Atk. 534. *Perry v. Phelps*, 17 Ves. 175.

(*p*) *Wilson v. Webb*, 2 Cox, 3.

(*q*) *Kenrick v. Jones*, 3 Bro. P. C. 306; but this cause was compromised. *Redeod. Tr. Pl.* 67.

(*r*) *Ibid.* p. 67, who cites 1 Chan. Rep. 233. 1 Chan. Cas. 122. 1 Eq. Cas. Abr. 164.

(*s*) *Mellish v. Williams*, 1 Vern. 166. *O'Brien v. O'Connor*, 2 Ball &

Beatty, 154. *Sed. vid.* *Bonham v. Newcomb*, 1 Vern. 216. *Brend v. Brend*, *ibid.* 214.

(*t*) *O'Brien v. O'Connor*, 2 Ball & *Beatty*, 154.

(*u*) *Fitton v. Macclesfield*, 1 Vern. 287. In *Goddard v. Goddard*, Chan. Rep. 139, a Bill of Review was not permitted sixteen years after the Decree.

(*x*) *Edwards v. Carrol*, 5 Bro. P. C. 466. 6 Bro. C. C. 395. *Smith v. Clay*, Ambl. 645, but more full 3 Bro. C. C. 639.

(*y*) *Lytton v. Lytton*, 4 Bro. C. C. 458.

(*z*) *Williams v. Mellish*, 1 Vern. 117.

curity for the Payment (a), but a Plaintiff has been allowed to file a Bill of Review without paying the Costs decreed in the original Cause, where the Defendant had been in Possession of the Estate in dispute twenty years (b).

With respect to *new matter*, it must be *relevant* (c); but the Rule has not been so strict as that the new matter must come to 540*] the Party's knowledge *after the Cause has been heard; it is sufficient, if it did not come to his knowledge till after *Publication*, or when by the Rules of the Court the Party could not make use of it. If it came to the knowledge of the Party's *Attorney, Solicitor, or Agent*, before the Cause was heard, it is considered as Notice to the Party (e). Lord Bacon's Rule has never been departed from (f). This Rule has these words, "in case such matter came to the knowledge of the Party *after the Decree*, and could not have been made use of in the Cause at the time of the Decree made." The language of the Rule is not explicit, but the construction put upon it is, "new matter that came to the knowledge of the Party *after Publication passed* (g)."

It has been questioned whether the *Discovery of new matter not in Issue* in the Cause in which a Decree has been made, would warrant a Bill of Review (h); but if such new matter demonstrated error in the Decree, it seems it might (i).

A Bill of Review, upon *new matter* discovered, has been permitted, even after an Affirmance of the Decree in Parliament (k); but it may be doubted whether a Bill of Review upon *Error in the Decree itself* can be brought after an Affirmance in Parliament (l), or even whether an Application can be made for 541*] *leave to file a Bill of Review while an Appeal is depending in the House of Lords (m).

A Bill of Review upon discovery of new matter has been allowed after two Trials, and a Decree to establish a Will; and where on such Bill another Trial had been ordered, and a Verdict obtained for the Heir at Law, the former Decree was reversed (n).

If a Man has less decreed him than he thinks himself entitled to he cannot bring a Bill of Review; for a Bill of Review lies only for him against whom there is a Decree (o).

(a) Savil v. Darrey, 1 Chan. Cas. 42, and Baston v. Biron, Dom. Proc. 1602, there cited. 2 Freem. 172.

(b) Fitton v. Macclesfield, 1 Vern. 254.

(c) Bennet v. Lee, 2 Atk. 522. Lord Portsmouth v. Lord Effingham, 1 Ves. 435.

(e) Morris v. Le Neve, 3 Atk. 35; and see Standish v. Radley, 2 Atk. 179. Lord Portsmouth v. Lord Effingham, 1 Ves. 434.

(f) 3 Atk. 25.

(g) Patterson v. Slaughter, Amb. 293.

(h) Amb. 293.

(i) Redead. Tr. Pl. 67, 68. 3d edit.

(k) 1 Vern. 416.

(l) Redead. Tr. Pl. 69. 3d edit.

(m) Willan v. Willan, 16 Ves. p. 89.

(n) Attorney-General v. Turner, Amb. 587.

(o) Glover v. Portington, 2 Freem 182, 183. Ch. Ca. 51.

A Bill of Review does not lie after a Demurrer to a former Bill of Review allowed (p) ; nor does it lie in respect of a Decree of the Court on Exceptions to a Decree of Commissioners of Charitable Uses, under the Statute (q). If upon a Bill of Review a Decree has been reversed, another Bill of Review may be brought upon the Decree of reversal (r).

If a *Report* is deficient, the defect cannot be cured upon a *Bill of Review* (s).

New Evidence may be adduced on a *Bill of Review*, unless where there is a Demurrer to a Bill of Review, in which case what appears on the face of the Decree can only be read (t).

A Bill of Review states the former Bill, and the *Pro- [*542 ceedings thereon—the Decree, and the point in which the Party exhibiting the Bill of Review conceives himself to be aggrieved by it—and the ground of Law, or new Matter discovered, upon which he seeks to impeach it: and if the Decree is impeached on the latter ground, it seems necessary to state in the Bill the leave obtained to file it, and the fact of the Discovery, though it may be doubted whether after leave given to file the Bill that Fact is traversable. The Bill may pray simply that the Decree may be reviewed and reversed in the point complained of, if it has not been carried into execution. If it has been carried into execution, the Bill may also pray the further Decree of the Court, to put the Party complaining of the former Decree into the situation in which he would have been if that Decree had not been executed. If the Bill is brought to review the Reversal of a former Decree, it may pray that the original Decree may stand (u).

When a *Bill of Review* is brought for *Error apparent*, the constant method has been said to be for the Defendant to put in a Plea and Demurrer ; a Plea of the Decree, and a Demurrer against opening the Enrolment (x). There seems, however, no necessity for pleading the Decree, if fairly stated in the Bill, a Demurrer alone being sufficient (y).

Where any Matter beyond the Decree, as length *of [*543 time, a Purchase for a valuable Consideration, or any other matter, is to be offered against opening of the Enrolment, that matter must be pleaded (z).

A Bill of Review upon the discovery of new matter seems liable to any Plea which would have avoided the effect of that matter, if charged in the original Bill. It appears to have been

(p) *Dunby v. Filmore*, 1 Vern. 135. S. C. 2 Ch. Rep. 64, and 2 Chan. Cas. 133. Nels. 64. 2 Vern. 120.

(q) *Redesd. Tr. Pl. 66*, in note (p).

(r) *Ibid.* 62; but see 1 Vern. 417.

(s) *Perry v. Phelps*, 17 Ves. 183. See *vid.* *Worge v. Bradley*, 2 Dick. 570.

(t) *Catteral v. Purchase*, 1 Atk. 290.

(u) *Redesd. Tr. Pl. 80, 81*, 2d edit.

(x) *Gould v. Tancred*, 2 Atk. 534.

(y) *Redesd. Tr. Pl. 166*, 3d edit. who cites 1 Chan. Cas. 122. 2 Freeman. 172. 1 P. Wms. 139. *Kenrick v. Jones*, 3 Bro. P. C. 319, &c. *Helbut v. Philpot*, Dom. Proc. 11th March 1725; but see 1 Ch. Rep. 233.

(z) 2 Vez. 109.

doubted whether the fact of the discovery of the matter alleged to support a Bill of Review, can be traversed by Plea, after the Court upon evidence of the fact, has given leave to bring the Bill; but if the fact of the discovery is in Issue in the Cause it ought to be proved, to entitle the Plaintiff to demand the Judgment of the Court on the matter alleged, as ground for reviewing the Decree, and it may consequently be disproved by Evidence on the part of the Defendant (a).

If in consequence of a Decree for the dismissal of a Bill, Money is paid over, and afterwards, on a Bill of Review, the Decree is reversed, the Plaintiff in the Bill of Review must seek for the Money from the Person to whom it is paid, and not from the Party who paid it in consequence of the original Decree (b).

Costs.

By the 17th Rich. II. cap. 6, a Power was given to the Chancellor, in case Writs appeared to him to be grounded upon untrue suggestions, to give Damages according to his discretion; and by the 15th of Hen. the 6th. ch. 4, no Subpœna was to be 544*] granted till *Security was found to satisfy the Defendant his Damages if the Bill was not verified (c); but that is not now the course of the Court.

We have already observed (d) it was also the ancient course of the Court in cases of *notorious Frauds* to make the Defendant pay *exemplary Costs*; but this also has long been disused (e).

Where a Person taken upon an attachment for not paying Costs was permitted by the Sheriff to escape, the Sheriff, on Motion, was ordered to pay the Money, and the Costs of the Application (f).

No Man, either in the *Courts of Equity*, or the *Common Law Courts*, subjects himself to an Action by *merely suing*, whether in a Criminal or Civil Form, however unfounded the Suit may be; nor is he otherwise punishable, except in the case of a Civil Suit, by the payment of Costs. If, however, a Suit in the Common Law Courts be malicious and false, the Party is liable in an Action (g), and punishable, on an Indictment or Information, by Fine and Imprisonment; and Defendants are punishable for Misbehaviour by Fine and Imprisonment (h); but there does not appear to be any instance of an Action or Prosecution for maliciously and falsely instituting a Suit in Equity.

In the consideration of this subject we shall consider, 1st. 545*] Costs in relation to Proceedings anterior to *a Decree;

(a) See Redesd. Tr. Pl. 236; and see p. 70.

(b) *Kettleby v. Lamb*, 2 Ch. Rep. 404, recognized in *Bennett v. Hamil*, 2 Sch. & Lefr. 578.

(c) Vid. 4 Inst. 82. 1 vol. Harg. Law Tracts, p. 332.

(d) Ante, 1 vol. p. 256.

(e) *Waltham v. Broughton*, 2 Atk.

(f) Anonymous, 11 Ves. 170.

(g) See Hob. 266.

(h) Vid. Har. Co. Lit. 161a a. n.

2dly. Costs given by Decree ; 3dly. Costs relating to matters subsequent to a Decree. The first and third description of Costs are observed upon, in general, on treating of the matters to which they relate. All, therefore, we shall now principally advert to, are the Rules which have obtained relative to *Costs given by Decree*.

If there be any oversight or mistake in the Bill, which requires Amendment *before* the Defendant's appearance, it may be amended upon Motion, without paying Costs ; but if it be amended *after* appearance, Costs must be paid (k).

If a Bill be referred for Scandal and impertinence, and so reported, and Exceptions are taken to the Report, and Allowed, the Plaintiff will have the Costs of the reference, but not if Exceptions are allowed to the Master's report of irregularity (l).

By a Rule of Court, 5*l.* are given as Costs, to be paid on the allowing or overruling a Plea or Demurrer ; and 5*l.* are directed to be deposited on the re-arguing a Plea or Demurrer ; but by a subsequent *General order* (m), the Parties are in all such Cases liable to such further Costs as the Court shall think fit to award. Where, therefore, a *third Bill* has been filed for the same Cause, and a Demurrer allowed, full Costs were, on Motion, ordered (n) ; and this, though common Costs only had been ordered *on the hearing of the Demurrer, together [*546 with the Costs of the Motion.

If a Plea be directed to stand for an Answer, with liberty to except, Costs follow of course ; but the usual Order in such Case makes no mention of Costs.

If a Demurrer be allowed by a Judge sitting for the Chancellor, and the Order is afterwards reversed, the Costs will be ordered to be refunded (o).

Where a Plea of another Bill of the same matter was overruled, on a Reference to the Master, who made a *special Report*, the Plaintiff was held not to be entitled to Costs (p).

After a Demurrer is set down to be argued, and submitted to, and the Bill is amended, the Defendant may move to have more than the common Costs on the account of the Expense he has been put to : five pounds have been allowed (q).

We have already observed upon Cost in Cases where the Surrender of a Copyhold is supplied (r) : and in Cases of Inter-

(k) See Eq. Cas. Abr. in marg. p. 29.

(l) Bromfield v. Chichester, Ambler, 464.

(m) 6 February 1794, 4 Bro. C. C. 546.

(n) Griffith v. Wood, 1 Ves. & Bea. p. 307. Wood v. Dynely, 1 Madd. Rep. 32. The Party, besides his full Costs, is entitled, it seems, to the Costs of the Proceedings previous to

the Demurrer, the Demurrer being overruled ; *see quæ.* the Practice in the Masters Offices varying.

(o) Oats v. Chapman, 1 Ves. 542 ; and see 2 Ves. 100.

(p) Huggins v. York Buildings Company, 2 Atk. 44. S. C. Barnard, p. 83.

(q) Anonymous, 9 Ves. 221.

(r) Ante, 1 vol. p. 71.

pleading Bills (*s*), Bills to perpetuate Testimony (*t*), Bills of Discovery (*u*), Bills for Partition and Dower (*x*), and other subjects, they have been incidentally mentioned.

Costs (except in a few Cases provided for by Statute) are entirely in the discretion of the Court (*y*), and are given not from any authority, but from Conscience, and *arbitrio boni viri*,—ac-547*] cording to **“a sound discretion,”* as it hath been called (*z*). As the Chancellor has a discretion as to the giving of Costs, he frequently exercises it by giving them *on such terms* as the justice of the case may require. But the exercise of a *discretionary* authority is every day, in some degree, diminished, by the wise Rules that are laid down upon the subject.

In Equity, as at Law, Costs usually follow the justice of the Demand (*a*), and *prima facie*, the Party who fails, pays Costs, and it depends on such Party to show the existence of circumstances in a sufficient degree to displace such *prima facie* claim of Costs (*b*).

“It would be,” says Lord Eldon, “a most satisfactory doctrine, if I was at liberty to say, that, in any species of Suit, the Rule that prevails universally at Law, that the Costs shall abide the event, was established in Equity; for, frequently, the most painful and anxious duty of a Judge in this Court is to execute well the Judgment as to Costs, depending more upon discretion than the merits; with reference to which, the Rules of Law and the principles of Equity guide you with much more certainty (*c*).” It is in many cases hard that Costs should follow the event of a Cause, yet (says the same great Judge) “all my experience has persuaded me that it is much to be wished that the course of the Court was so. Certainly, however, that is not the present course of the Court; where there is a fair Case for con-548*] sideration *it is not the course to visit the Party who fails with Costs” (*d*).

Where the Court perceives a Party has been harrassed by vexatious Litigation, it will mark his disapprobation of such conduct, by giving the Party harrassed full Costs, but where a fair Question has arisen full Costs ought not to be given (*e*).

In the *Exchequer*, it is said, the Plaintiffs are entitled to their Costs in Equity where they recover, without any Order for them (*f*).

The Rule of the Court is never to give Costs but where there appears to have been no just grounds for the Proceedings (*g*).

(*s*) Ante, 1 vol. p. 181.

(*t*) Ante 195.

(*u*) Ibid. 216.

(*x*) Ibid. vol. 1. p. 243, 249.

(*y*) Jones v. Coxeter, 2 Atk. 399.
Bennett Coll. v. Carey, 3 Bro. C. C.
390. Skirrett v. Athy, 1 Ball & Bea.
435.

(*z*) 7 Ves. 29; and see Corporation
of Burford v. Lenthall, 2 Atk. 551.

(*a*) 2 Atk. 113.

(*b*) Vancouver v. Bliss, 11 Ves.

463. White v. Foljambe, 11 Ves. 337.
Roberts v. Kuffin, 2 Atk. 113.
Hampson v. Brandwood, 1 Madd.
Rep. 394.

(*c*) Vancouver v. Bliss, 11 Ves.
462.

(*d*) Staines v. Morris, 18 Ves. 16.

(*e*) O'Donel v. Browne, 1 Ball &
Beatty, 205.

(*f*) Warburton v. Warburton,
Vin. Abr. tit. Costs (a) Cas. 3.

(*g*) Anon. 3 Atk. 234.

Where, therefore, it appears a Plaintiff has the *Dista* of several Judges in his favour, the Court will not give Costs against him (*h*).

In all those Cases where an Attorney has taken a *Gift* from his Client, and no *third* Person has been interposed, and a Bill is filed to examine the transaction, Costs, says Lord Eldon, never ought to be given [to the Attorney] upon the result of that Examination (*i*).

By the Statute, 4 Anne, c. 16, s. 23, full costs, to be taxed, are given in all Cases where a Plaintiff dismisses his own Bill, or it is dismissed for want of Prosecution.

If a Bill is dismissed with Costs. and the Costs are levied, and afterwards the Cause is re-heard, and the *former Decree reversed, the Costs must be refunded. So, if an Order for the allowance of a Demurrer is reversed, the Costs must be refunded (*k*).

Where a Plaintiff is absurd enough to refuse a fair offer of accommodation, and obstinately persists in his Suit, it is considered as an aggravation, and the Bill, if dismissed, will be so with Costs (*l*).

Where a Cause is set down on *Bill and Answer* only, or where it is to set down after withdrawing a Replication (*m*), it is discretionary in the Court to dismiss with *forty shillings* Costs, or Costs to be taxed, or with no Costs (*n*); and though it is the common course of the Court to give only *forty shillings* Costs upon the dismissal of a Suit heard on Bill and Answer (*o*), yet if a special Case be made (*p*), if the Party, for instance, has acted vexatiously, full Costs will be given (*q*).

Where a Cause is set down to be heard on Bill and Answer, and the Court, not thinking the Answer full enough, directs an *Issue*, on the merits (*r*), or directs a reference to the Master (*s*), or if an act is required to be done by the Defendant, this is not hearing a Cause upon Bill and Answer only, but a subsequent Proceeding, and therefore out of the Rule of dismissal with *forty shillings* Costs (*t*).

*Whenever a Bill is in part dismissed, being right in one [*550 point and wrong in another, the Decree is usually without Costs (*u*); and a Bill may altogether be dismissed without Costs (*x*),

(*h*) *Perry v. Whitehead*, 6 Ves. 54.
(*i*) *Harris v. Tremenhere*, 15 Ves.

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(*k*) *Oates v. Chapman*, 1 Ves. 100.

(*l*) *Bigginton v. Grubb*, 2 Atk. 48.

(*m*) See 2 Atk. 288.

(*n*) See *Ordo Curiae*, 27th April

1748. 2 Atk. 289. 3 Atk. 579; and

see *Cowdell v. Tatlock*, 3 Ves. &

Bea. 20.

(*o*) *Anon.* 2 P. Wms. 387.

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(*p*) *Bayley v. Corporation of Leominster*, 1 Ves. jun. 476.

(*q*) *Mansel v. Bowles*, 1 Bro. C.

C. 463. *Johnson v. Browne*, 3 Atk. 1.

(*r*) *Newsham v. Grey*, 2 Atk. 216.

(*s*) *Ibid.* 287.

(*t*) See *Sutton v. Stone*, 2 Atk. 101.

(*u*) *Mackreth v. Symonds*, 15 Ves.

p. 354.

(*x*) It was done in *Priestly v. Wil-*

kinson, 1 Ves. jun. 214. *Lilla v.*

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or with Costs to be paid by Relators (y); but it has been held, that if a Bill is dismissed, the Court cannot give the Plaintiff his Costs (z).

Frequently the Court, to put an end to Litigation, dismisses a Bill without Costs, if the Plaintiff shall think fit to wave any Action at Law; if otherwise, with Costs (a).

It seems, that if a Suit is brought in Equity and dismissed with Costs, and an Action is brought at Law on the same account, and Damages are recovered, the Costs of the Suit in Equity may 551*] be deducted out of the Costs at Law (d). The Court, however, will not upon Motion discharge a Person in Execution for Costs upon a demand arising to him from the Person to whom he is in Execution (e).

A *Prochein Amy* has, on Petition, been allowed Costs, although the Infant's Bill was dismissed with Costs (f); but Costs beyond the taxed Costs will not be allowed to a *Prochein Amy* (g). A *Prochein Amy* is to be encouraged to every possible extent while he can be supposed to intend the Infant's benefit; and no degree of mistake or misapprehension would be sufficient to charge a *Prochein Amy* with Costs. If the Bill was filed with a fair intention, and not to answer any purpose of spleen, he must have his Costs; but if there was no pretence for the Suit, the Bill will be dismissed, with Costs, to be paid by the *Prochein Amy* (h).

But if an Infant by his *Prochein Amy* brings a Bill, and never stirs in it after he comes of Age, and the Bill is dismissed, the Infant and the *Prochein Amy* are both liable to Costs (i).

If a Defendant disclaims generally, and the Plaintiff replies to

Airey, 1 Ves. jun. 278. M'Leod v. Drummond, 14 Ves. 363. Wheldale v. Partridge, 5 Ves. 498. Lloyd v. Johns, 9 Ves. 67; and see 13 Ves. 250, and 11 Ves. 550.

(y) 1 Atk. 356.

(z) Cooth v. Jackson, 6 Ves. 41; but see Bennett Coll. v. Carey, 3 C. C. 390. In Springfield v. Ollett, before V. C. Plumer, 19th June 1816, (Mr. Merivale, by mistake, 3 Meriv. 430, in note states the Case to have occurred in 1817,) the point was much argued, whether, where a Bill is dismissed, the Defendant can be ordered to pay the Plaintiff his Costs. The V. C. was strongly inclined to think he might; but the point was not decided. Mr. Cooke argued to the contrary, and said that the point could not have been much discussed Bennett Coll. v. Carey, as he found he had taken notes on that day, and had no note on the subject, neither had Mr. Cox, who took notes the

same day; and he said he thought Brown's was a mis-report. In Lewis v. Loxham, 3 Meriv. 429, the Cause stood over at the instance of Sir S. Romilly, to inquire if there was any precedent of making a Defendant pay the Plaintiff's Costs when his Bill was dismissed, but none was found, and the Bill was dismissed, without Costs.

(a) See Laurenson v. Butler, 1 Sch. & Lefr. 13. Harnett v. Yielding, 2 Sch. & Lefr. 560; but see Howell v. George, 1 Madd. Rep. 13.

(d) Gurish v. Donovan, 2 Atk. 166. S. C. in note, 2 Ves. & Bea. 114.

(e) Holworthy v. Allen, 2 Bro. C. C. 17.

(f) Taner v. Ivie, 2 Ves. 66.

(g) Osborne v. Denne, 7 Ves. 424.

(h) Whitaker v. Marter, 1 Cox, 285.

(i) Turner v. Turner, 2 P. Wms. 297. S. C. Sel. Cas. 49. 1 Str. 708, and 2 Eq. Abr. 238.

the Answer, and serves a Subpœna to rejoin, the Defendant is, entitled to have Costs for the vexation. It is otherwise where the Disclaimer* is to part, and the Answer is as to another part (k).

If a Feme Sole files a Bill, and pending the Suit marries, and Baron and Feme bring a Bill of Revivor, and obtain a Decree with Costs, they are entitled to Costs for the whole Suit, excepting only the Costs of the Bill of Revivor (l).

When a Cause is brought to a hearing upon the Equity reserved after Trial of an Issue, on a particular Action directed by the Court, the Court, if they mean to give the Costs at Law, especially direct payment of such Costs, together with the Costs of the Suit in Chancery (m).

No Costs will be given to a Trustee who has misbehaved (n); nor will he be allowed Costs in respect of a Deed impeached for Duress (o).

A Bill for a specific Performance of an Agreement was made necessary by a Trustee refusing to join in the Conveyance. The Court being of opinion that the Trustee ought to pay all the Costs of the Suit, the Decree was, that the Plaintiff should pay the Costs of all the other Defendants (*although he had a Decree against them*), and recover over the whole Costs from the Defendant, the Trustee (p).

Where a Will was held to be void for uncertainty, and a Bill was filed by Persons claiming under the Will, making Trustees therein appointed, Parties, the *Court refused the Trust- [553] tees their Costs, there being no Fund in their hands, and they being Trustees of a nullity (q).

If a Bill be filed against a Trustee for the re-sale of an Estate purchased by him, the Court, where Infants are concerned, gives Relief, with Costs (r).

It has been laid down, that wherever Interest is given against Executors for a breach of Trust, Costs follow as of course (s). Where a Bill is filed against an Executor for an Account, and to answer a breach of Trust, it seems he is liable to Costs in what regards the *breach of Trust* (t), but not beyond that (u). It is not an invariable Rule that an Administrator shall be allowed Costs at all events (x).

(k) Williams v. Longfellow, 3 Atk. 582.

(l) Durbaine v. Knight, 1 Vern. 318.

(m) Davis v. Lord Brownlow, 2 Dick. 796.

(n) Lloyd v. Spillet, 3 P. Wms. 347. Herberdasher's Company v. Attorney-General, Vin. Abr. tit. Costs, A. Ca. 3. Dawson v. Parratt, 3 Bro. C. C. 236; and see 5 Ves. 128. 6 Ves. 488.

(o) Colman v. Sarrell, 1 Bro. C. C. 55.

(p) Jones v. Lewis, 1 Cox, 199.

(q) Mobun v. Mobun, 1 Swanst. 201.

(r) Saunderson v. Walker, 13 Ves. 601.

(s) Seers v. Hind, 1 Ves. jun. 294; but see Ashburnham v. Thompson, 13 Ves. 404. Sammes v. Rickman, 2 Ves. jun. 36.

(t) Raphael v. Boehm, 13 Ves. 590; and see Caffrey v. Darby, 6 Ves. 497.

(u) Ibid.; but see Humphrey v. Morse, 2 Atk. 408.

(x) Wilkins v. Hunt, 2 Atk. 161.

The giving of Costs may be reserved generally by the Decree (y), for they are entirely in the discretion of the Court; and where they think it would accelerate a Decree, the Court may postpone the consideration of the Costs till the Cause comes back from the Master, though there might be grounds enough for decreeing Costs even at the hearing of the Cause (z); but a Plaintiff may apply for Costs, where a Defendant gives unnecessary trouble in carrying a Decree into Execution (a).

554*] *Where the Costs of a Trustee are directed to be taxed that means, as between *Party and Party*, and not in the larger way as between *Attorney and Client*: but where a Trustee in the fair execution of his Trust has expended Money, by reasonably and properly taking opinions, and procuring directions that are necessary for the due execution of his Trust, he is entitled, not only to his Costs, but also to his Charges and Expenses, under the head of *just Allowances* (b). Trustees and Executors brought into Court are allowed their Costs though they make a claim which fails; but if an *Heir at Law* is made a Defendant, and he raises a point which fails, he will not be allowed his Costs (c).

A *Mortgagee* is, *prima facie*, entitled to his Costs (d), unless there be positive misconduct (e). In cases where his conduct has been either usurious (f), oppressive (g), unjust (h), or fraudulent (i), or where he has made an unjust Defence (k), as by setting up an absolute Title (l), he has not been allowed his 555*] *Costs; and there may be cases where he would even be obliged to pay the Costs of the Mortgagor (m).

A *Mortgagee* is allowed the Costs of procuring Administration to an Encumbrancer under the Will of the Mortgagor, as a necessary Party to the Foreclosure (n).

Where a Bill was filed by the first Mortgagee, and a Sale directed with the consent of the second and third Mortgagee, and the Fund proved deficient, the Costs were ordered to be paid in the first place (o).

(y) *Sanderson v. Walker*, 13 Ves. 601.

(z) *Scarborough v. Burton*, 2 Atk. 111.

(a) *Ibid.*

(b) *Fearn v. Young*, 10 Ves. 13. I am told it has been recently decided that the Cost mentioned above, as obtainable under the head of "just Allowances," are only allowed where the Costs are taxed as between *Party and Party*, and not where Costs are taxed as between *Solicitor and Client*; so that in many cases it may be more advantageous to have the Costs taxed as between *Party and Party*.

(c) *Rashley v. Masters*, 1 Ves. jun. 205.

(d) See — *v. Trecothick*, 2 Ves. & Bea. 181.

(e) *Loftus v. Swift*, 2 Sch. & Lefr. 657.

(f) *Bromley v. Holland*, 7 Ves. 27. S. C. Coop. 25.

(g) *Detillin v. Gale*, 7 Ves. 583, and *Shuttleworth v. Lowther*, cited *ibid.* 587.

(h) *Mocatta v. Murgatroyd*, 1 P. Wms. 393.

(i) *Moroney v. O'Dea*, 1 Ball & Beatty, 121, and Cases in note.

(k) 1 P. Wms. 395.

(l) *England v. Codrington*, 1 Eden, 109. *Spurgeon v. Collier*, *ibid.* 160.

(m) See Case mentioned by Lord Eldon in — *v. Trecothick*, 2 Ves. & Bea. 181.

(n) *Hunt v. Fownes*, 9 Ves. 70.

(o) *Kenebel v. Scrafton*, 18 Ves. 370.

Where an Executor is a Defendant at Law, and fails in his Defence, he must pay Costs *de bonis Testatoris, si non, de bonis Propriis*, and it is said to be the same in Chancery (p); but the Rule seems to be, that in Equity it is discretionary whether the Court will make an Executor pay Costs or not (q).

An Executor, though made a Defendant by his Co-Executor, will be allowed his Costs (r).

When a Bill is brought against the Executor and Heir at Law for an Account of real and personal Assets, Executors are not allowed their Costs, because they may renounce; but it is the Law which casts the descent upon the Heir, and that differs his case from Executors; and if he has accounted justly *for [*556 such Money as is come to his hands it entitles him to Costs (s).

It is said to be a settled Rule that the Executors of an Insolvent shall not have Costs, for they need not have administered (t).

If an Executor commits a *Fraud* he will not be allowed Costs out of the Estate, though the Testator has directed that for any Expenses the Executor might be at, he shall be allowed his Costs out of the Estate; for he could never mean to save him harmless when he has been guilty of a *Fraud* (u).

It seems, that if an Executor, on a Bill filed against him, *denies Assets*, he will, if it appears there are Assets, be obliged to pay Costs out of his own Pocket; but if the Accounts are of such a nature that make it impossible to say whether or not there are Assets, he will be allowed to retain his Costs out of the Estate (x).

Where Relief is given on a Bill filed on grounds of *public policy*, Costs are usually given, the Relief being, not on account of the Individual, but of the Public (y).

Where an Information is filed to remedy a breach of Trust by granting long Leases of a Charity Estate, the Relief will be given with Costs.

If there be a Decree for an account of *Tithes*, *it is al- [*557 ways with Costs unless there has been a *tender* (z).

It is the constant course of the Court where a mutual account is decreed to reserve the Costs until after the Report, that the Court may have it in their power to punish the wrong-doer (a).

The Plaintiff usually pays Costs where an Account turns

(p) *Jefferies v. Harrison*, 1 Atk. 453. *Sed qu.* see *Humphreys v. Moore*, 2 Atk. 108.

(q) *Uvedale v. Uvedale*, 3 Atk. 119.

(r) *Blount v. Barrow*, 3 Bro. C. C. 90.

(s) *Humphrey v. Moore*, 3 Atk. 408; and see *Uvedale v. Uvedale*, 3 Atk. 119.

(t) *Adair v. Shaw*, 1 Sch. & Lefr. 280.

(u) *Hide v. Hetwood*, 2 Atk. 126.

(z) *Sandys v. Watson*, 2 Atk. 379.

(y) *Jackman v. Mitchell*, 13 Ves. 586.

(z) *Stockwell v. Terry*, 1 Ves. 118. *Pitts v. Page*, 8th May, 1716. Dom. Proc. Lord Harcourt's MS. Tables.

(a) *Rider v. Bayley*, Vin. Abr. tit. Costs, (B) Ca. 32.

against him, or where he prevails in nothing but what he might have insisted upon at Law (b) ; but though Costs usually follow the event of the Account, still if it was intricate or doubtful no Costs will be given (c).

Where Money was found due to the Defendant upon Account, but much less than had been claimed by the Defendant's Answer, the Defendant was not allowed his Costs (d).

If a Commission issue for the Examination of Witnesses abroad, a Solicitor attending the execution of the Commission will not be allowed his Costs (e).

The general personal Estate not specifically disposed of is first to be applied to the Costs (f), and then in payment of the Legacies ; and the specific Legatee is only to contribute as far as the Costs occasioned by the Inquiry as to his specific Legacy (g).

558*] *A Defendant made a Party to a Suit only in respect to an Annuity which she is entitled to under a Will, is not allowed to attend at the passing the Accounts of the general Estate in the Master's Office, or to be paid the Costs of past attendances as next of Kin to the Party beneficially interested in the residue of the Estate, who had since become a Lunatic, there being no direction in the Decree for such purpose (h).

Where a Bill is brought to secure and have the benefit of a contingent interest devised over, the Costs must be paid out of the Assets of the Testator, who by his Will has occasioned the difficulty (i).

Where a question arises between an Individual and the Person taking the bulk of the Estate, how far the bulk of the Estate is to answer for a Legacy (k), a sum of Money, or a Portion, Costs are paid out of the Estate (l) ; but where the bulk of the Property is handed over, and the question arises as to the right to Property clearly severed from the bulk of the Property, the Expense of questions touching such Fund must be borne by the Fund itself (m).

Wherever a Testator by his Will raises a doubt upon the meaning of it, his general Property pays for settling that doubt (n).

Where a Testator devises Property, and the effect of the Deed 559*] vise is questioned on account of a previous *Deed execu-

(b) Lyre v. Parnel, *ibid.* Ca. 23.

(c) Pitts v. Page, *ibid.* Case 11.

(d) Attorney-General v. Brewers Company, 1 P. Wms. 376.

(e) Hammond v. Wordsworth, 1 Dick. 381.

(f) See Howe v. Chapman 4 Ves. 549, 550.

(g) Barton v. Cooke, 5 Ves. 464.

(h) Tharp v. Tharp, 3 Meriv. 510.

(i) Studholme v. Hodgson, 3 P. Wms. 301.

(k) Baugh v. Reed, 3 Bro. C. C. 195.

(l) Jenour v. Jenour, 10 Ves. 571 ; and see Wilson v. Brownsmith, 9 Ves. 180.

(m) Jenour v. Jenour, 10 Ves. 571, 2.

(n) Barrington v. Tristram, 6 Ves.

349. Jolliffe v. East, 3 Bro. C. C. 25.

Pearson v. Pearson, 1 Sch. & Lefr. p. 12 ; and see 3 P. Wms. 373.

ted by the Testator, and the Devisee litigates with others the effect of that Deed, and the decision is against the Devisee, though under the circumstances of the obscurity of the Deed the Plaintiff is not ordered to pay Costs, he cannot claim his Costs out of the subject in dispute (o).

In a Cause between Relations, contesting the effects of a Will, Costs are often given out of the Estate, and as between *Attorney* and *Client* (p).

If several Defendants in a Cause are entitled to a Fund in equal shares, and long inquiries are necessary as to one share only, a direction will be given that each share should bear its own Costs (q).

Where an Heir at Law is made a Defendant, and insists on his Title, he is entitled to his Costs though he fails; but if an Heir at law is Plaintiff and he fails, he will not have his Costs, and if the Suit be groundless, he will pay them (r); but where an Heir at Law, or the Heir male to the honour of a Family, has a probable cause to contend for the family Estate, he will not be made to pay Costs (s).

Where a Bill is filed to establish a Will, and the *Heir at Law*, a Defendant, desires an Issue and fails, he is entitled to his Costs in Equity (t); but no Costs will be given on either side as to the Issue; and the Heir at Law has been made to pay the Costs of a groundless Motion for a new Trial (u).

*Where an Heir at Law is brought, by Order, before [*560 the Court, he is entitled to Costs (x).

Costs are always allowed where the facts contested are presumed to be in the knowledge of the Party that contests them (y).

If a Defendant not confessing the Plaintiff's Title puts him to the expense and trouble of proving it, it is a circumstance to give Costs (z).

Where a specific Performance of an Agreement at a great undervalue is enforced, Costs are not given (a).

Where a Bill for specific Performance is dismissed on the ground of *misrepresentation*, it will be with Costs (b). Wherever, indeed, a Bill for specific Performance is dismissed in respect of circumstances *dehors* the Agreement, it seems it must be with Costs; for the Court refusing its assistance in itself implies a strong disapprobation of the Plaintiff's conduct (c).

(o) *Hampson v. Brandwood*, 1 Madd. Rep. 393.

(p) *Moggridge v. Thackwell*, 1 Ves. jun. 475.

(q) *Basevi v. Serra*, 14 Ves. 317. S. C. 3 Meriv. 676.

(r) *Luxton v. Stephens*, 3 P. Wms. 373.

(s) 1 P. Wms. 482.

(t) *Webb v. Cleverden*, 2 Atk. 424.

(u) *White v. Wilson*, 13 Ves. 87.

(x) *Attorney General v. Tonna*, 4 Bro. C. C. 178.

(y) *Cockraine v. Blantire*, Vin. Abr. tit. Costs (Q.) Ca. 20.

(z) *Trinity House v. Ryal*, Vin. Abr. tit. Costs (Q.) Ca. 22.

(a) *Burroughs v. Lock*, 10 Ves. 476.

(b) *Buxton v. Lister*, 3 Atk. 387.

(c) *Davis v. Symonds*, 1 Cox, 408.

On Bills for a specific Performance of an Agreement to purchase an Estate, the Court has sometimes thought it imprudent to give the Defendant Costs, though they may have been reasonable and weighty objections to the Title; because to give Costs is to injure that Title he is compelled to take, and in such case the Court has decreed a specific Performance *without Costs* (d).

561*] Where a Party has not been able to make his Title *before the Decree, it is always a question very important to the Costs (e). A Vendor not making a Title when the Bill is filed, pays the Costs up to the Report of a good Title (f).

If a Vendor, in a Suit for a specific Performance, cannot make a good Title, it is *prima facie* a case for Costs; and Costs have been given against such Vendor though he was only a Trustee to sell (g).

If the Title of the Vendor, though established, is not clear upon the abstract, the Court, on a Bill for specific Performance by the Vendor, will decree a specific performance *without Costs* (h).

A mistake in the opinion of a Counsel, which in a clear Case has not thought the Title good, will not exonerate the Purchaser from paying Costs if a Bill for a specific performance is filed against him (i).

If, on a Bill for a specific Performance by a Vendor, the Defendant objects to the Title, and there has been a previous decision in a different Cause in favour of the same Title, of which Notice had been served on the Defendant, a specific Performance will be decreed, with Costs (k); but wherever there is a fair objection to a Title, a Purchaser, though he fails in his objection, is not made to pay Costs (l).

Where Tenant by *Elegit* has received Rents and Profits beyond the Debt, though he shall account *for the Debt, yet he will not be made to pay Costs (m).

Governors of a Charity, though they gain nothing, nor are guilty of corruption, yet if they have been extremely negligent in their Trust, are punishable with Costs (n).

In cases of Charity, Relators have often Costs allowed them beyond the taxed Costs (o); and in Suits upon questions relative to *charitable* Legacies, Costs are frequently given to the Heir, as between Attorney and Client, the Heir not making an improper point (p).

(d) *M'Queen v. Farquhar*, 11 Ves. 482.

(e) *Seton v. Slade*, 7 Ves. 279.

(f) *Harford v. Parrier*, 1 Madd. Rep. 532.

(g) *Edwards v. Harvey*, Coop. 40.

(h) *Collinge v. —*, 3 Ves. & Bea. 143. in note.

(i) *Making v. Hill*, 1 Cox, 187.

(k) *Biscoe v. Wilks*, 3 Meriv. 432.

(l) *Aislabie v. Rice*, 3 Madd. Rep.

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(m) *Carey v. Stafford*, Ambl. 520.

(n) *East v. Ryal*, 2 P. Wms. 284; and see 3 P. Wms. 148, note (a.)

(o) *Osborne v. Dunn*, 7 Ves. 424.

(p) *Currie v. Pye*, 17 Ves. 468.

It has been determined, upon the construction of the Statute of Charitable Uses, 43 Eliz. c. 4, that Commissioners have no power to give Costs; but the Chancellor has given Costs upon exceptions taken to a Decree of *Charitable Uses*; though the ground upon which he did so is not very clear (q).

So, in cases of *Bankruptcy* he can give Costs, though nothing in the Bankrupt Acts seem to authorize him.

It is the same as to Costs under Commissions of *Lunacy*, they are given, though the foundation of the right to give them is not very discernible (r).

Costs, it seems, are not given on a Bill of Review (s), unless on a Bill of Review for Error, where *the Costs are of [*563 course, if there be no Error in the Decree (t).

It seems that more Costs will be given to a *Pauper* beyond the Costs actually out of pocket (u). Where, however, one of the Defendants was admitted to *sue in forma pauperis*, and the Decree ordered generally that the Costs of all Parties should be taxed and paid out of the Estate, the Costs of the *pauper* Defendant were allowed to be taxed as *dives* Costs (x).

The Costs of impertinence expunged from the Answer of a *Pauper*, have been ordered to be taxed as *dives* Costs to be paid into Court, and await the event of the Cause in its further progress. The Court has a discretion in such case (y).

A *Pauper* cannot dismiss his Bill without Costs (z).

Costs have been given personally against an *uncertificated Bankrupt* in a case of Fraud and Misconduct (a).

Where Persons apply to set aside an Annuity, if they have taken their chance as long as it is good for them, they will not be permitted to set it aside without paying Costs (b).

There is hardly a Case of a Bond set aside for fraud or improper consideration, but it ought to be with Costs (c).

*And in Cases of gross Fraud the Court will sometimes [*564 give Costs, to be ascertained by the Party's own Oath (d).

Where *Fraud* is charged but not proved, the Court will give the Defendant Costs (e).

Where a *Feme Covert* has been guilty of a Fraud solely without the Husband, and he has no benefit from it, he will not be obliged to pay Costs (f).

(g) Aylett v. Dodd, 2 Atk. 239; and see Corporation of Burford v. Lenthall, 2 Atk. 552, 3, 4.

(r) See Corporation of Burford v. Lenthall, 2 Atk. 552, 3, 4.

(s) Jackson v. Eyre, 2 Freem. 181. S. C. 3 Ch. Rep. 15.

(t) Bolger v. Mackall, 5 Ves. 509.

(u) Frost v. Preston, 16 Ves. 160.

S. C. M8.; and see Dann v. Russell, 1 Dick. 427, and Angel v. Smith, Prec. Ch. 219, which is in opposition to the opinion of Lord Somers in *Scratchmere v. Faulkard*, 1 Eq. Cas. Abr. 125.

(z) Wallop v. Warburton, 2 Cox, 409.

(y) Rattray v. George, 16 Ves. 234.

(x) Pearson v. Belsher, 3 Bro. C. C. 87.

(a) Lock v. Bromley, 3 Ves. 40.

(b) Duff v. Atkinson, 8 Ves. 584.

(c) Debenham v. Ox, 1 Ves. 277.

(d) Dyer v. Timewell, 2 Vern. 123.

(e) The Mayor, &c. of Colchester v. Lowton, 1 Ves. & Bea. 248.

(f) Cotton v. Lutterell, 1 Atk. 463.

Where a Widow files a Bill for the single purpose of having Dower assigned her, Costs do not follow the Suit ; but where in Bills for Dower separate questions of Title arise, and are conducted vexatiously (*g*) ; or where the Widow has without any just pretence been vexatiously kept out of her Dower, she will be allowed her Costs (*h*).

If a Party unconscientiously obtains a judgment at Law, and a Bill of Discovery is afterwards brought, the Defendant pays the Costs of both Proceedings ; but if the Discovery is obtained before the Expenses at Law are incurred, the Defendant gets his Costs.

Where a Bill is for a Discovery, and a Commission is prayed for the Examination of Witnesses abroad, if both Parties have had the benefit of the Commission to examine Witnesses, each pays his own Costs (*i*).

565*] A Creditor is not entitled to Costs incurred in *proving his Debt before the Master under the usual Decree upon a Creditor's Bill (*k*).

In some cases, where Costs have been incurred by Contempts, the Court, to avoid further Expense, will *by consent*, instead of ordering Costs to be taxed, direct the payment of a specific sum for Costs.

No Costs are given on an Appeal, if the Decision of the inferior Court be reversed ; and when the Court thinks there was good ground for an Appeal it will order the Deposit to be returned (*l*).

We shall now observe upon the *taxation* and *recovery* of Costs, and on the *Lien* of Solicitors.

Costs in respect of *conveyancing* are not taxable ; they are not considered as " fees, charges, or disbursements at Law or in Equity ;" but if one single *item* which may be so considered, though to the amount of 3s. 4d. only, is to be found in the Bill, the Plaintiff cannot recover for the conveyancing without a delivery of such Bill, for in such case the charges for conveyancing fall within the Statute 2 Geo. 2. c. 23 (*m*).

Where *any part* of a Solicitor's Bill relates to business done in the Court of Chancery, *the whole* may be taxed, though part of the business was for other Persons jointly with the Person applying (*n*).

Formerly Solicitor's Bills would not be ordered to be taxed, unless the whole demand was brought into Court ; but the Act of Parliament (*o*) varied the Rule, and enabled the Client to

(*g*) *Lucas v. Calcroft*, 1 Bro. C. C. 134, and S. C. from Sir Samuel Romilly's note, 18 Ves. 20 n. a.

(*h*) *Worgan v. Ryder*, 18 Ves. 20.

(*i*) *London Assurance Company v. Hankey*, 1 Anstr. 9.

(*k*) *Abel v. Screech*, 10 Ves. 355.

(*l*) As was done in *Higinbotham v.*

Holme, 19 Ves. 93, and in various other cases.

(*m*) *Hill v. Humphreys*, 2 Bos. & Pull, 345.

(*n*) *Margerum v. Sandiford*, 3 Bro. C. C. 233.

(*o*) 2 Geo. 2. c. 23. s. 22.

have the Bill taxed, *upon submitting to pay what should appear to be due (p).

An application may be made by a Solicitor to tax his *own Agent's Bill* (q). *Agency* business performed by an Attorney for his Client, it has been held, does not come within the Act of Parliament as to the taxing of Costs (r); nor has the Court Jurisdiction to order a Solicitor's Bill for business done in the House of Lords (s), or for obtaining an Act of Parliament, to be taxed (t); nor the Costs of a Commission of Review of a decision of the Delegates (u); or in respect of business done in a Cause in the Court of Great Sessions of Wales, unless there is a detention of Title Deeds, or any other matter besides Costs in dispute (x).

If a Bill of Costs has been settled and paid, and the Payment has been acquiesced in, the Court will not refer such Bill to be taxed as a *matter of course*. The general Rule is, that an Attorney's Bill, which has been delivered according to the Statute, for the purpose of creating a capacity of bringing an Action, cannot be taxed at the Trial, or after Verdict; but, under special circumstances, the Court will refer it to be taxed, if it is shown by Affidavit that the business has not been done, or that the charges are fraudulent; and neither payment of the Money, nor a Release, nor a Judgment for the demand, will preclude Taxation* in such a case (y). Nor, in general, can Accounts [*567 be taken on the Taxation of a Bill, for the Court will not stop the Payment to have the Accounts taken (z).

An Order for taxing a Bill of Costs entitled in the Cause, if obtained by a Party in the Cause, is regular under the general Jurisdiction; but a Person, not a Party in the Cause, must apply *ex parte* under the Statute (2 Geo. 2, c. 23, s. 22,) (a). A Party in the Cause may make a Motion in the Cause: whether he may afterwards pursue it under the Statute may be questionable (b).

Though a Trustee has paid a Solicitor's Bill, the *Cestui que Trust* may use the name of the Trustee (first indemnifying him) to obtain a Taxation of the Bill (c).

On the Taxation of Costs, the Court cannot, on account of improper conduct, make the Attorney pay the Costs of the Taxation, but only where there are *improper Items* in the Bill amounting to a sixth of the Bill (d); but he will be ordered to

(p) See Anon. 2 Ves. 451.
(q) Corner v. Hake, 2 Cox. 173.
(r) Binstead v. Barefoot, 2 Dick. 112.
(s) Williams v. Odell, 4 Price 279.
(t) Ex parte Wheeler, 3 Ves. & Bea. 21.
(u) Ex parte Fearon, 5 Ves. 646, 647.

(x) Ex parte Partridge, 2 Meriv. 1550. See *vid.* 4 T. R. 496.
(y) Langstaff v. Taylor, 14 Ves. 263; and see Plenderleath v. Fraser, 3 Ves. & Bea. 174.
(z) Anon. 2 Ves. 451.
(a) Bignol v. Bignol, 11 Ves. 328.
(b) *Ibid.* p. 329.
(c) Hazard v. Lane, 3 Meriv. 291.
(d) Yea v. Yea, 2 Anstr. 494.

pay the Costs of useless Expenses in Proceedings before the Master (e).

Whilst an Attorney's Bill is taxing before the Master, the Court will not make any Order on the Master for the allowance of certain Charges in the Bill (f).

568*] If an Attorney's Bill in Bankruptcy is referred to *the Master, and he reduces it above a sixth, the Chancellor, proceeding by analogy to the Statute, makes him pay the Costs of the Taxation (g).

Where an Attorney had been seven years without getting his Bills taxed after an Order so to do, and they were lost in the mean time in the Master's Office, the Court will not allow it to go again to the Master (h).

A Representative of a Person who had obtained an order to tax a Bill can revive it only on an undertaking to pay. To bring a Defendant into contempt on an Order of Taxation, it is necessary to leave a Copy at his house, and the Report of the Sum at which the Bill is taxed.

If a Solicitor declines proceeding in a Suit (whatever his reasons), and does not carry the business through to a hearing, he loses his Lien on the Fund in Court (i).

It has been held, that a Solicitor undertaking to bring an Action, or do any business, part of the undertaking is that he shall faithfully and honestly bring that business to a conclusion, and if he fails in that, he cannot bring an Action for any thing (k).

The same Parties are often concerned in many Suits, but the Funds are never arranged until the respective Attornies are paid their Costs (l). But, it seems, that where different demands arise in a Cause, the Costs may be arranged as the equities between the Parties require, without considering the Solicitor (m), *provided it be fairly and honestly done (n). A mere voluntary release (o), or Settlement (p), is not sufficient.

The Court of King's Bench has holden that the Equity of set-off shall not interfere with the Solicitor's Lien: the Court of Common Pleas, on the contrary, hold, that the Attorney can have no Lien that will interfere with the Equity between the Parties (q); and in Chancery, the Court does not interpose the

(e) Yea v. Ferere, 14 Ves. 154.

(f) Anon. 27th Nov. 1805. MS.

(g) Westall, ex parte, 3 Ves. & Bea. 141.

(h) Yea v. Yea, 2 Anst. 494.

(i) Creswell v. Byron, 14 Ves. 272.

(k) Vid. Observations in Bankruptcy, 6 Ves. p. 2.

(l) Per Lord Eldon in Hall v. Ody, 2 Bos. & Pull. 29.

(m) Taylor v. Popham, 15 Ves. 79.

Sed. vid. S. C. 13 Ves. 59, before Lord Erskine. See also Spinc v. Gough, 2 Ball & Bea. 34, 5. It is the same at Law. [Browne v. Sayce, 4 Taunt. 322. and Cases there noticed.]

(n) Anon. 1 Ves. 25, 6.

(o) Ibid. 26.

(p) Fairland v. Enever, 1 Dick. 114.

(q) 2 Bos. & Pull. 29.

Lien further than upon the clear Balance, which is the result of the Equity between the Parties (r).

Where there are Costs in Equity and at Law due from the opposite Parties, the Court will not set off the Costs at Law against those in Equity (s), especially if the Solicitor in Equity claims his Lien on the latter (t).

If a Suit is brought, and Costs incurred, and the Suit is dismissed for want of appearance at the Hearing, and the Plaintiff files another Bill, an Application may be made to stay the Proceedings until the Costs of the former Suit are paid (u).

A Bill filed by an Attorney for Costs is not sustainable, and may be demurred to; for he should proceed, either by Action at Law, or apply to a *Court of Equity (x) in a summary [*570 way, according to the Statute (y).

In regard, however, to an *Action at Law* for Costs, it seems, from a recent Decision, that Costs awarded in Chancery, particularly Costs in Bankruptcy, will not be permitted to be the subject of an *Action*; nor, it seems, will a special undertaking to pay, affect the Rule; and where a Judgment had been obtained at Law, and Execution for such Costs, the Party, on Motion, was ordered to acknowledge satisfaction on the Judgment, and to repay the Expense incurred by the Action, and in levying the Money under the Execution, together with the Money so levied, and the Costs of the Motion in Chancery (z).

Solicitors have a *Lien* on the Fund in Court for their Expenses, whether in the way of *Suit*, or Prosecution in *Lunacy* or *Bankruptcy* (a); and though an Order be made, on a Petition in Bankruptcy, directing Costs to be paid to the Petitioner personally, this does not take away the Lien of the Solicitor for his Costs (b).

At *Law* a Party cannot change his Attorney without a Judge's Order; and the Court takes care that the Papers shall not be taken out of his hands, without doing that justice which his Lien gives him; but it is not so in Chancery, for there at his option, he may discharge his Attorney, and proceed if he can without his Papers, but he cannot take his Papers out *of the hands of the Solicitor without paying his Bill (c); [*571 but if a Solicitor declines to be further concerned in a Cause, he cannot, to compel Payment of his Costs, refuse to permit

(r) *Ex parte Rhodes*, 15 Ves. 541,
2. *Taylor v. Popham*, *ibid.* p. 79.

(s) *Holworthy v. Mortlocke*, 1
Cox, 302.

(t) *Smith v. Brocklesby*, 1 Anstr.
61. *Anon.* 2 Ves. 25.

(u) *Picket v. Loggon*, 14 Ves. 231.
and 244.

(x) *Parry v. Owen*, Ambl. 109.
Contra Raneleigh v. Thornhill, 1
Vern. 203. S. C. 2 Cha. Cas. 154.
Norris v. Bacon, 1 Vern. 312.

(y) 2 Geo. 2 cap. 23.

(z) *In re Dillon*, 2 Sch. & Lefr.
110.

(a) *Ex parte Price*, 2 Ves. 407.

(b) *Ex parte Bryant*, 1 Madd. Rep.
49.

(c) *Twort v. Dayrell*, 13 Ves. 196;
and see *Merryweather v. Mellish*, 13
Ves. 161. *O'Dea v. O'Dea*, 1 Sch. &
Lefr. 315, 316.

such inspection of the Papers in his hands, or such production of them before the Court, or the Master, as may be necessary in the conduct of the Cause (*d*).

If a Solicitor dies, the Court will not order his Representative to deliver up Papers without paying what is due (*e*).

A Client in the Country who employs a Country Solicitor is not liable to the Agent in Town (*f*); but the Agent in Town has a Lien upon the Papers in his hands for what was due to him, as *Agent in the Cause*, from the Solicitor in the Country (*g*), but not, it seems, for Money lent to the Solicitor (*h*).

A *Six Clerk* is not obliged to deliver Papers to the Plaintiff until his Fees are paid, though the Plaintiff had paid his Solicitor, who had satisfied his Clerk in Court his whole Bill (*i*).

A Party may be restrained from paying any part of the Bill of Fees, &c. due to the Solicitor, until the Clerk in Court employed by him in the Cause is fully paid (*k*).

572*] A Solicitor procuring a Decree has a Lien for his *Bill on the Estate recovered in the hands of the Person recovering, but not in the hands of the Heir (*l*), unless *Costs* are decreed *out of an Estate*, in which case they are held to be a Lien upon it, though the Party to whom they are awarded died (*m*); and they are payable even as against the Bond Creditors of the deceased (*n*).

Though a Solicitor may have a Lien on a Deed for his Costs, yet if his Client is bound to produce it for the benefit of a third Person, so also is the Solicitor (*o*).

If Papers come into a Person's hand in the character of Attorney or Solicitor for the purpose of business, though they did not come into his hands in the particular Cause in which he makes the demand of Costs, he has a Lien upon them (*p*). As where Deeds were delivered to an Attorney for the purpose of raising Money, and that object failing, were permitted to remain in his hands, it was held equivalent to a general deposit (*q*).

If a Tenant for Life places Deeds in an Attorney's hands, the Attorney has no Lien on them for his Costs against the Remainder-man, for that would be to enable a Tenant for Life to charge the Remainder-man (*r*).

An Attorney having delivered up Deeds to an Executor

(*d*) *Commerell v. Poynton*, 1 Swanst. 1.

(*e*) *Redfearn v. Sowerby*, 1 Wils. C. C. 96.

(*f*) *Farwell v. Coker*, 2 P. Wms. 460.

(*g*) *Ward v. Kepple*, 15 Ves. 207 *ibid.* 2 P. Wms. 461.

(*h*) *Grey v. Cockerell* 2 Atk. 114.

(*i*) *Taylor v. Lewis*, 2 Atk. 727

(*k*) *Stevens v. Avery*, 1 Dick. 224, and the Cases there mentioned.

(*l*) *Barnsley v. Powell*, Amb. 102.

(*m*) *Blower v. Myrick*, cited in *Morgan v. Scudamore*, 3 Ves. 197.

(*n*) *Turwin v. Gibson*, 3 Atk. 720.

(*o*) *Furlong v. Howard*, 2 Sch. & Lefr. 115.

(*p*) *Ex parte Neabitt*, *ibid.* 279.

(*q*) *Pamberton, ex parte*, 18 Ves. 282.

(*r*) *Ibid.* 279.

(which he was not obliged to do until his *Bill was paid), [*573 which Deeds would be of great use to the Executor in several Suits that were then carrying on, the executor having changed his Attorney; this is a sufficient consideration to make the Executor liable for the full demand, whether there were Assets or not (s).

A Client cannot compel the Executor of his Attorney to produce his Papers, &c. in Court, though only for the purpose of using them there, and not to take them out of the Executor's possession, without paying the Costs due (t).

Appeal.

AN Appeal is either to the *Lord Chancellor* from a Decree at the Rolls, or from the Judgment of the Lord Chancellor to the *House of Lords*. When an Appeal is considered as necessary, a *caveat* must be entered against the signing and enrolling the Decree, which stays the same for twenty-eight days from the presenting the Decree to the Chancellor.

In 1581, Appeals to the House of Lords, in Causes between Party and Party, appear to have been first introduced, and Entries made respecting them in the Journals of the House of Lords. In this Session there is a long Memorandum made of a Cause between the *Marquis of Winchester*, his *Lady*, and one *Mr. Oughtred*, which at last was referred to a Committee of Lords, chosen by the Parties themselves, for their determination (u). After the Restoration, few points *were debated [*574 with more zeal and inquiry than what related to *original* and *appellant* Jurisdiction in Parliament (x). The *appellant* Jurisdiction, however, is now fully acknowledged, and is considered as the most important in its consequences to the whole administration of justice in all the three parts of the United Kingdom, and designed to keep all other jurisdictions in due obedience to the Laws of the several Countries to which they respectively belong, and to render the system of Laws administered to the People in each Country uniform and consistent in itself, that all those Tribunals may know what are the Laws by which they are bound, and that the Legislature alone may make Laws (y).

(s) *Duchess of Hamilton and Mal-edan*, 27 Jan. 1719. Dom. Proc. Lord Harcourt's MS. Tables.

(t) *Magrath v. Lord Muskerry*, 1 Ridw. P. C. 476.

(u) 4 Parl. Hist. 235.

(x) The subject is ably considered by Mr. Hargrave, in his learned preface to Sir Matthew Hale's Jurisdic-

tion to the Lords House of Parliament.

(y) Vid Lord Redesdale's Observations occasioned by a Pamphlet entitled objections to the Project of creating a Vice Chancellor of England, p. 5, 6; and see 2 vol. Paley's Philosophy.

There may be two Hearings at the Rolls, and a Hearing afterwards upon Appeal before the Lord Chancellor (z).

In like manner an Appeal may be made from the Decision of the Vice-Chancellor at Lancaster, to the Chancellor of the Duchy Court of Westminster (a).

An Appeal will not lie to the Chancellor from a Decree of a Court of Equity in a *County Palatine* (b), though Lord Keeper North at first seems to have thought it would (c).

575*] *Appeals lie to the Lord Chancellor from the *Great Sessions* in *Wales* (d). So also from the Lord Mayor's Court (e).

A Petition of Appeal from a Decree made by the *Master of the Rolls* must be presented within *one month* after the Decree is pronounced (f), and 10*l.* deposited with the Registrar (g). A Petition of Appeal from the Rolls may be *withdrawn* upon a motion for that purpose, and a consent (h).

By an Order of the House of Lords, an Appeal to that House must be made within fifteen days after a Decree is pronounced, if pronounced *during the Session* (i).

The Court guards against abuse of the right to re-hear or Appeal, not only by using its discretion as to Costs, but also by requiring the signature of Counsel (k). The Appellant must, within eight days after his appeal is received, give Security to the Clerk of the Parliament by Recognizance in the Penalty of 200*l.*, to pay such Costs to the Defendant in the Appeal as the Court shall direct, in case the Decree be affirmed (l).

In 1697 an Order was made in the House of Lords, that no Counsel should sign an Appeal unless he was of Counsel in the Cause in the Courts below, or should attend as Counsel when 576*] the Appeal is heard (m). *On the 23d of March 1715, a Counsel, *on his knees*, received a reprimand from the Chancellor for disobeying this Order (m).

When the Appeal is lodged, and read in the House, the Defendant is ordered to have a copy, and required to put in an Answer to the same by a particular day. If no answer is put in by that time, a peremptory day is fixed (n). If the Session expires before such peremptory day, and no Answer is put in before the end of the Session, service of the Order upon the Respondents

(z) *Browne v. Higgs*, 8 Ves. 567, and Case mentioned in note to *Omerod v. Hardman*, 5 Ves. 725.

(a) *Omerod v. Hardman*, 5 Ves. 725. See Reporter's Note to *Addison v. Hindmarsh*, 1 Vern. 442.

(b) *Tennet v. Bishop*, and *Portington v. Tarbock*, 1 Vern. 124.

(c) *Portington v. Tarbock*, 1 Vern. 177.

(d) *Anon.* 1 Freem. 312.

(e) *Ibid.*

(f) *Ordo. Canc.* 213.

(g) 2 Turn. & Ven. 865.

(h) *Thompson v. Thompson*, 10 Ves. 30. *Anslie v. Medicot*, 1806. MS.

(i) *Smith v. Clay*, 3 Bro. C. C. 643, in note.

(k) *Monkhouse v. The Corporation of Bedford*, 17 Ves. 381.

(l) *Lords Journal* 27th Jan. 1710, cited Newl. Harr. 349.

(m) *Ibid.* 16 vol. p. 224.

(n) *Lords Journal*, 20 vol. p. 320.

(a) Newl. Harr. 349.

five weeks before the first day of the next Session, is good service, and the Appellant may apply for a peremptory day for putting in the Answer, if the Respondents shall not put in their Answer within three days from the first day of the next Session (o).

In general, Persons not Parties in the Cause, are not entitled to an Appeal (p); but if a Tenant in Tail, Party to a Suit, dies, leaving Issue, the Issue may appeal (q); and if the Tenant in Tail dies without Issue, a succeeding Tenant in Tail (r), or Remainder-man, may appeal.

Where a Decree is made by consent, no Appeal (t), or Rehearing lies; and this, though the Party did not really give his consent; his remedy being in such case against his Counsel, &c. (u); and it seems, if *Parties agree there shall be no Appeal, and it is made an Order of Court, the Party cannot appeal (x); but merely consenting to an Order consequential on a Decree does not preclude the Party from the right of Appeal (y).

An Appeal has been allowed from the *Master of the Rolls* to the *Lord Chancellor* in respect of Costs only (z); but, it seems, an Appeal or a Rehearing will not, in general, lie, in respect of Costs only (a). There is a Case, however, on an Appeal to the House of Lords, where a Decree was reversed as to Costs only (b); and *Lord Hardwicke* has said, that in particular Cases the Rule may and has been dispensed with; and in a Case where a Bill was brought against a Tenant by Elegit for an Account, and Costs were given against the Defendant, an Appeal was allowed in respect of Costs only (c); and where the Court has by the Decree applied the Fund of the Party to a Payment to which it ought not to have been applied, by which means no Fund remained for the payment of Costs, an Appeal was held to lie; the Costs being thus disposed of as matter of relief (d); and where the question how Costs are to be paid, forms part of the relief prayed *by the Bill, and thus appears on the [*578 Record, an Appeal will lie (e).

Where a Bill is in part dismissed, and as to other parts leave is given to proceed at Law within a limited time, and the Bill

(o) Newl. Harr. 350.

(p) Williams v. Lane, 23 Feb. 1726. Dom. Proc. Lord Harcourt's MS. Tables.

(q) Osborne v. Usher, 2 Bro. P. C. 214.

(r) Lloyd v. Johns, 9 Ves. 56.

(t) Taylor v. Bouchier, 1 Dick. 504.

(u) Bradish v. Gee, Ambl. 229.

(x) Buck v. Fawcett, 3 P. Wms. 242.

(y) Wood v. Griffith, 1 Meriv. 35.

(z) Gould v. Granger, Mos. 395.

(a) Wirdman v. Kent, 1 Bro. C. C.

140. Show. P. C. 15, 16. Car v. Purcel, 29th Feb. 1727. Dom. Proc. Crosby v. Shadworth, 4th April 1720. Dom. Proc. noticed in Lord Harcourt's MS. Tables.

(b) Husband v. Husband, 7 Bro. P. C. 433, Toml. edit.; and see what is said in Gould v. Granger, Mos. 395.

(c) Owen v. Griffith, Ambl. 520. S. C. 1 Ves. 250.

(d) Taylor v. Popham, 15 Ves. 78. S. P. Anon. MS. 1808.

(e) Jenour v. Jenour, 10 Ves. 572.

is retained in the mean time, and no proceedings take place at Law, and the Bill is dismissed, the Defendant cannot complain of the Decree by the way of Appeal.

Upon a *Re-hearing*, new Evidence, as before observed (f), is admitted (g), and upon an *Appeal* from the *Rolls*, new Evidence is admissible (h); but this Rule, it has been thought, does not extend to permit the Appellant to examine *de novo*, and introduce entirely new Evidence into the Cause. In a Case, however, of an Appeal from the *Rolls* a Witness whose Evidence was read there, put in an Answer to a Bill, by which it appeared that on the day he was examined the Plaintiff gave him a Bond that if he recovered the Land in question he would convey part of it to the Witness; and this Answer was allowed to be read on the Appeal (i); and in the same Case it was held, that if after the Hearing, a Witness is convicted of Perjury, the Party may take advantage of it on a Rehearing (k). It is different on an Appeal *to the *House of Lords*, for there, no new Evidence is admitted (l).

In regard to the question of Costs, it seems, that if Testimony be added upon an Appeal to the Chancellor, the Party, if he succeeds, must indemnify the other for not having that Evidence at the time it ought to have been read (m): and Lord Hardwicke appears to have thought, that the Appellant must in such case give up his Deposit (n). So, if on the Appeal, the Decree is not materially varied, the Appellant is not entitled to his Deposit (o).

When the Lords *vary*, or *reverse*, a Decree of the Court of Chancery, it is necessary to move, to make the Judgment of the Lords a *standing* Order of the Court, because it is to be carried into execution in the Court of Chancery; but it seems this is not necessary where the Decree is *affirmed* by consent (p).

When an Appeal is abated in the House of Lords, the Order to revive is obtained of course, and there is no fresh Summons (q). The same matter can never be brought before the House of Lords twice upon an alteration of circumstances, or on any other pretence, for their determination is the dernier resort, and

(f) Ante, p. 483.

(g) *Cotterell v. Purchase*, 1 Atk. 390; and see *Dashwood v. Lord Bulkeley*, 10 Ves. 236. *White v. Fussell*, 1 Ves. & Bea. 153. *Ambl. 92*.

(h) *Wright v. Pelling*, Prec. in Ch. S. C. Gilb. Eq. Rep. 151. *Needham v. Smith*, 2 Vern. 433. *Hedges v. Cardonell*, 2 Atk. 408. *Walker v. Symonds*, mentioned in note to 1 Meriv. 37. *Sed vid. contra Thompson v. Walker*, Prec. Ch. 295. *Addison v. Hindmarsh*, 1 Vern. 442; and see what is said in *Huddleston v. Briscoe*, 11 Ves. 593.

(i) *Neelam v. Smith*, 2 Vern. 463.

(k) *Ibid.* 464.

(l) *Cunyngham v. Cunyngham*, *Ambl. 90*.

(m) *White v. Fussell*, 1 Ves. & Bea. 153.

(n) *Hedges v. Cardonell*, 2 Atk. 408.

(o) *Holworthy v. Mortlock*, 1 Cox, p. 144.

(p) *Attorney-General v. Scott*, 1 Ves. 419, 420.

(q) *Byne v. Potter*, 5 Ves. 305.

the only Security to a Title, so that there can be no Re-hearing (r).

If Money has been paid, in pursuance of a Decree which is afterwards reversed, the Persons paying the Money are [*580 indemnified by the Decree, and the Money must be sought from the Person to whom it is paid (s).

If an Appeal has been received by the House of Lords, the Court, it seems, will order Money awarded to a Party to be paid into Court; but it will not do so merely because the Petition of Appeal has been signed by Counsel (t).

Appeals are not determined by the prorogation (u) or dissolution (x) of Parliament, but continue in the same state they were then in.

Petitions in Causes.

THE office of a Cause Petition is to carry a Decree into execution, and therefore, it seems, a defect in a Decree cannot be supplied by Petition (y).

Transfers of Stock or Money, to which Parties are entitled under a Decree, will not be ordered to be paid out of Court on Motion, but a Petition in the cause is necessary (z); the same Rule prevails in the Court of Exchequer (a); and upon many occasions Vice-Chancellor Leach has laid it down as a general Rule, that whenever a gross Sum of money is sought to be paid out of Court, a Petition is necessary, to prevent a surprise upon the Court. Interest on a gross Sum may be applied for on Motion (b).

*If the Right of the Party to Money appears only by the [*581 Master's Report, it seems it cannot be obtained on Petition, but the Report being confirmed, the Cause must be set down for further directions (b).

A Legatee attaining the age at which his Legacy was to be paid may petition to have his Share transferred to his Attorney, if he chooses (c).

The Court will restrain the payment of Monies decreed to

(r) Countess of Radnor and Child, 1707. Dom. Proc. and Master and Willoughby, 7th March 1705. Dom. Proc. noticed in Lord Harcourt's MS. Tables.

(s) Kettleby v. Lamb, 2 Ch. Rep. 404, stated more fully in Bennet v. Hamell, 2 Sch. & Lefr. 578; and see O'Brien v. Grierson, 2 Ball & Beatty, 336, and note. Farrell v. Smith, ib. 337.

(t) Lewis v. Harber, 1 Price, 132.

(u) 1 Ventr. 266. 1 Lev. 165. 2 Lev. 93. Goffow v. Sedgwick.

(x) Sir T. Raym. 383, 4. Com. Dig. tit. Parliament, p. 2.

(y) Vid. Bruyere v. Pemberton, 12 Ves. 391, and Creuze v. Howth, 4 Bro. 157, 316, there referred to; and see S. C. better reported 2 Ves. jun. 164.

(z) Lord Shipbrooke v. Lord Hinchbrook, 13 Ves. 394. Contra Tyrell v. Tyrell, MS.

(a) See 4 Price, 22.

(b) Anon. 4 Madd. Rep. 212.

(b) Anon. MS.

(c) Hill v. Chapman, 11 Ves. 239.

Parties on the Petition of Persons who have had such Monies assigned to them (d).

The Court will not, on Petition, direct Money to be paid out to an *Infant Executrix*, but will refer it to the Master to inquire whether there are any Debts or Legacies, and to consider of a maintenance (e).

An Order made on a *Petition* (unless it be an *ex parte* Petition) cannot be discharged on *Motion* (f).

If a Cause Petition be presented, and is in the Paper, and the Petitioner does not appear, if the Respondent produces an Affidavit during the sitting of the Court, of service of the Petition upon him, it will be dismissed with Costs (g).

Accountant General.

THE office of Accountant General was created by Statute (h), and is employed in the receipt, placing out, and payment, of the Suitors Monies.

582*] *The only two cases in which the Accountant General ever tries a Fact, are, 1st. Where under an order to pay Interest to a single Woman he continues to pay her, upon receiving proof of her Marriage : 2dly. Where he receives the Probate of a Will as proof of the death of a Party, and upon that pays the representative (i). A *Prerogative Probate* is necessary in all cases, whether the sum be large or small (k), the Accountant General not being authorized to pay Money under a provincial Administration (l).

In the case of Marriage, it seems the Accountant General must not only have proof of the Marriage, but an Affidavit that the Interest of the Fund is not affected by any *Settlement* or *Articles* (m).

On a Decree for payment of Debts, if it appears on the Pleadings that the Creditor is an Infant, the Accountant General will not pay such Creditor, though he has come of age, on a Certificate of the Baptism, but an Order must be made by the Court for the Payment (n).

Where an Order is made to pay a Sum into the hands of the *Accountant General*, he will not receive less than the whole Sum, without another Order for that purpose (o).

Where Money is directed by an Act of Parliament to be paid

(d) Duke of Bolton v. Williams, 4 Bro. C. C. 480.

(e) Campart v. Campart, 3 Bro. C. C. 195.

(f) Bishop v. Willis, 2 Ves. 113.

(g) Dunbar v. Boldero, MS. 34th Jan. 1818, before V. C. Leach.

(h) 12 Geo. 1. c. 32; and see 54 Geo. 3. c. 14.

(i) Clayton v. Gresham, 10 Ves. 223.

(k) See ante, p. 495, and the Authorities there cited.

(l) Docker v. Horner, 3 Bro. C. C. 240. S. C. 2 Dick 746.

(m) 10 Ves. 290.

(n) Anon. MS. 1806.

(o) Payne v. Collier, 1 Ves. jun. 171.

to the Accountant General, he is bound by the Act to receive it, and the Court does not make an Order for that purpose (p).

*A Person entitled at Twenty-one to Money invested in [*583 Stock in the name of the *Accountant General*, petitioned to receive a Dividend only, and to let the Money continue in the Accountant General's name; but this the Court refused, and ordered him to take the Money (q).

Where Money, by an Order of the Court, is paid into the Accountant General's hands, to be placed in the Bank, until it can be laid out according to the directions of a Decree, if the Party moves for an Application of the Money, he must not only have a Certificate that the Money was paid into the Bank, but that it is actually in the Bank at the time the Motion is made (r).

A Power of Attorney executed in *Paris*, in the presence of two Witnesses, and authenticated by a Notary there, and an Affidavit here verifying the Signature of the Notary, has been ordered to be acted upon by the Accountant General (s).

We here conclude the view of the Practice of the Court. It is, for the most part, founded in great wisdom (t), and is in a constant state of amelioration; but much of it still requires amendment. That the course of the Court, is the law of the Court and unalterable except by the Legislature, has been the *opinion of many Judges (u); but it must be admitted, [*584 that the Practice has arrived at its present state with very little assistance from the Legislature, and is founded, in a great degree, upon *General Orders* or *Regulations*, made from time to time by the Chancellors, that have always been considered as binding, unless where there has been a continued practice to the contrary, which has been taken to amount to a reversal of an Order (x). The observation of *Lord Mansfield* on this subject seems founded in wisdom: "When an *error* is established and has taken root, upon which any *Rule of Property* depends, it ought to be adhered to by the Judges until the Legislature thinks proper to alter it, lest the new determination should have a retrospect, and shake many questions already settled; but the re-

(p) *Anon.* 1 Ves. jun. 56.

(q) *Isaac v. Gompertz*, 1 Ves. jun. 44.

(r) *Anon.* 1 Atk. 519.

(s) *Lord Kinnaird v. Lord Saltoun*, 1 Madd. Rep. 227.

(t) See what *Lord Eldon* says in *Hylton v. Morgan*, 6 Ves. 296.

(u) See *Lane's Case*, 2 Co. 16, and what *Mr. Just. Powell* said on the Trial of the Seven Bishops. See also what *Lord Hardwicke* says in

Graves v. Budgell, 1 Atk. 445; and what *Blackstone* says, 1st vol. Com. 142. *Lord Eldon* has often expressed the same opinion, see 11 Ves. 47; and *Lord Erskine* followed him, see 12 Ves. 19; but see what is said in *Tomkin v. Lethbridge* 9 Ves. 178, 463, and in *Ogilvie v. Hearne*, 11 Ves. 600.

(x) *Boehm v. De Tastet*, 1 Ves. & Bea. 328. *Anon.* MS.

forming *inconvenient points of Practice* can have no such bad consequences, and therefore they may, by way of general interposition, be altered at pleasure, when found to be absurd or inconvenient" (y). *Lord Thurlow* (z) and *Lord Redesdale* (a) appear to have coincided in this respect with *Lord Mansfield*; and indeed, as *Lord Ch. Justice Wilmot* observes, "it would be endless to enumerate instances where the King's supreme Courts of Justice in *Westminster Hall* have for the ease and benefit of 585*] *the Suitors of the Court, reformed, amended, and new moulded and modified their Practice, as from experience and observation they found it would best advance, improve, and accelerate the administration of justice" (b).

It may be urged, that it is dangerous to leave the Practice at the discretion of the Judge, since he might partially exercise such a discretion to the injury of the Suitor; partiality, however, in an English Judge, is seldom or ever discernible. Indeed, the purity with which Justice has been administered in England since the Revolution, is beyond all praise, and such as no State, ancient or modern, ever witnessed; and so long as it retains its glorious character, the Constitution of England will be indistructible. If a Judge, in a case before him, sees that the existing Practice is absurd or inconvenient, his language is, "In the *present instance*, I shall adhere to the Rule, because such has hitherto been the Practice, but in *future* the Practice shall be altered." Acting in this manner, prospectively only, all injury, or suspicion of partiality, is prevented, and an amelioration of the Practice is easily effected. So unlimited is the acknowledged power of the different Courts over the Practice, that it may be a just matter of surprise that any acknowledged defects are found to exist.

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*BOOK III.

STATUTORY JURISDICTION.

UNDER this head we shall advert to the Jurisdiction exercised by the Chancellor in the Court of Chancery solely in virtue of Acts of Parliament giving such Jurisdiction. We shall not here notice those acts which have regulated or enlarged the Equity Jurisdiction of the Chancellor, they having been already adverted to in the course of the Work. The only

(y) 1st vol. Black. Rep. 264.

(a) Tr. Pl. p. 2, edit. 3.

(z) Vid. 4 Bro. 408, 479; and see ib. 544.

(b) Wilmot's Rep. 97.

Jurisdiction which will here be alluded to is that which *begins* and *ends* in Acts of Parliament, and is exercised in the Court of Chancery.

CHAP. I.

Court of Delegates. Commission of Review.

By the 25 Hen. 8, c. 19, an Appeal is given from the respective Courts of the Archbishops to the King in the Court of Chancery, and upon such Appeal, a Commission is to be directed to such Person as his Majesty shall name. This is the Court known as the *Court of Delegates*. Sir Leoline Jenkins it appears (*b*), to prevent the inconveniences incident to the present mode of appointing a Court of Delegates, proposed to make a standing Commission of Delegates, and he had formed a draught of Rules to be established by the King's authority, but no measure of the sort took place.

*If a Suit in an Ecclesiastical Matter affects the King, [*587 by the 24 Hen. 8, c. 12, an Appeal may be made, within fifteen Days, to the Upper House of Convocation: and this Statute, it seems, is not repealed by the 25 Hen. 8, but is of little use, since the crown has ceased to summon the Houses of Convocation.

Persons interested in, or aggrieved by, a sentence in the Ecclesiastical Court, may Petition for a Commission of Delegates, though not Parties to the original Suit (*c*).

A *full Commission* of Delegates, i. e. to Judges of the Common Law, *Civilians* and *Lords Spiritual and Temporal*, is sometimes granted; but, in general, the Commission consists only of Judges and *Civilians* (*d*).

Where the Jurisdiction of Bishops is in controversy, or any question is depending that concerns the Canon and Ecclesiastical Law, it seems usual to grant a *full Commission*, in order to balance the objection of a partiality to one Law more than another; but where, in other cases, it is a mere *question of Law*, it is usual to direct the Commission to Judges and *Civilians* only (*e*).

Sometimes a Special Commission of Delegates issues to begin the Suit, and proceed originally in the Cause, as where the Archbishop himself is interested (*f*); but, except in such cases, the Court of Delegates seems to have no original Jurisdic-

(*b*) See his Life, p. 52.

(*c*) Jones v. Bougett, 1 Atk. 298.

(*d*) In the Case of Harford v. Morris, adjudged in 1784, certain Members of the House of Peers were na-

med in the Commission and acted. See 1st. vol. Wood. Lect. 147.

(*e*) Ex parte Hillier, 3 Atk. 708.

(*f*) 1 Oughton's Ordo Judicorum, 437. 1 Burn. Eccl. Law, 55.

tion, but is only to *review, and to reverse or affirm, the Sentence appealed from. It cannot fine or imprison (*g*). Whether it has power to excommunicate, seems formerly to have been doubted (*h*), but is in practice sometimes exercised. It is subject to a prohibition (*i*).

The question, whether it is a case in which an Appeal will lie, is always determined by the Chancellor before he issues the Commission (*k*), who in some cases has referred the question to some of the Judges (*l*). But though a Commission is issued, the Commissioners, may entertain the question, whether it is a case in which an Appeal lies (*m*). Whether the Appeal to the Delegates is *in time*, is a matter also to be determined by the Delegates (*n*).

No Appeal lies to the House of Lords from a Sentence by the Delegates (*o*), but it may, on a proper case made, be *reviewed*, on a *Commission of Review*, unless the Party has for a length of time (five Years for instance) acquiesced under the Sentence (*p*).

The principle to be extracted from the few Cases on the subject of Commissions of Review, is comprehensively expressed by Lord Eldon, in the following Certificate to his Majesty on a Case of this description.—“ This Commission is prayed of the grace and benignity of the Crown (*q*). Its sound discretion, by 589*] which its grace and benignity are guided *has, upon obvious grounds of public expediency, usually induced it to withhold Commissions of Review, unless there are very cogent reasons for believing that the Sentence sought to be reviewed is founded upon *error in fact*, or *in Law* ; or, unless the doctrines of *Law* upon which the Sentence is supposed to be founded, are *so questionable*, or *important*, as to make it clearly fit that they should be considered in the most solemn manner” (*r*). It seems, a Commission of Review may be granted of a Sentence given by the Delegates in a *Maritime Cause* (*s*).

The Court of Review is also liable to a Prohibition (*t*).

(*g*) 4 Inst. 334.

(*h*) 2 Bulstr. 4 *contr.* 2 Roll. Abr. 233.

(*i*) 4 Inst. 341.

(*k*) Sir Henry Blount's Case, 1 Atk. 296. Head v. Harris, 2 Sch. & Lefr. 564.

(*l*) Coveney's Case, Dyer 209 a.

(*m*) 1 Atk. 296. 2 Sch. & Lefroy, 565.

(*n*) Head v. Harris, 2 Sch. & Lefr. 564, 5.

(*o*) Sant v. Wilson, 2 Vern. 118.

(*p*) Hill v. White, Mas. 35.

(*q*) See Franklin's Case, 2 P. Wms. 299. 4 Inst. 341.

(*r*) Vid. Eagleton and Coventry v. Kingston, 8 Ves. 481. S. C. MS. where all the preceding Cases on the Subject are referred to, such as Matthews v. Warner, 4 Ves. 186. Ex parte Fearon, 5 Ves. 633, &c.

(*s*) See Sir Leol. Jenkins's Life, 2d vol. p. 721.

(*t*) 4 Inst. 341.

CHAP. II.

Bankruptcy.

ALL the Chancellor's Jurisdiction in Bankruptcy is derived from the Legislature (a). The Term *Bankrupt*, is unknown to the Common Law.

The first Statute on the subject is the 34 & 35 Hen. 8, c. 4, which gave the Chancellor, the Chief Justices, and others therein mentioned, an authority *to sell and distribute the [*590 Property of Persons therein described. And by the Statute it is observable, that whatever the rank in life of the Debtor was, who had obtained the goods of others, and afterwards fled, or kept his house, such Person was held subject to the operation of the Statute. The Statute was the foundation of all the subsequent Statutes in Bankruptcy, which are numerous (b). The great object of these Statutes is an equal and impartial distribution of all the Bankrupt's Property among his Creditors.

This Jurisdiction of the Chancellor is of the utmost importance, and is subject to no Appeal. It is in the first instance *ministerial*, and so far original. It is secondarily, *appellate*; but the original and appellate Jurisdictions are frequently blended in exercise. The issuing of Commissions of Bankruptcy, and all the questions arising upon the Issue, are matters of original Jurisdiction. The execution of the Commission is intrusted to certain Commissioners, who are assistant Judges, given to the Chancellor by the authority of Parliament, to enable him to execute the Bankrupt Laws. The Commissioners determine in the first instance, on every part of the subject subsequent* [*591 to the issue of the Commission, until the close of their proceedings, and the whole business of a Bankruptcy may be transacted without further application to the Chancellor, until the Bankrupt shall apply for an allowance of his Certificate. But all the proceedings of the Commissioners are liable to revision by the

(a) In *ex parte Lund*, 6 Ves. 782, 2, the Chancellor is reported to say, that he acted in Bankruptcy under a *Special commission*; but the Chancellor must thereby have meant that he had a special Authority from the Legislature. See 2 Christian's Bank. Law, 215.

(b) Such as 12 Eliz. c. 7. 1 Jac. 1. c. 15. 21 Jac. 1. c. 19 13 and 14 Car. 2. c. 24. 4 and 5 Ann. c. 17, expired. 5 Ann. c. 22, expired. 7 Ann. c. 12. 10 Ann. c. 15. 5 Geo. 1 c. 24, expired. 7 Geo. 1. c. 31. 12 G. 1. c. 4. 5 G. 2 c. 30; made perpetual by 37 Geo. 3. c. 120. 19 Geo. 2. c. 32.

24 Geo. 2. c. 57. 4 Geo. 3. c. 23. 36 Geo. 3. c. 90. 45 Geo. 3. c. 124. 46 Geo. 3. c. 135. 49 Geo. 3. c. 121. 56 Geo. 3. c. 137.

The Irish Statute, 11 and 12 Geo. 3. c. 8, first introduced the Bankrupt Law into Ireland, and is, with a few exceptions, a consolidation of all the English Statutes then in existence. It was prepared by Mr. Hellen, who was then Solicitor General in Ireland, and afterwards a Judge. The Bankrupt Statutes since the Union apply to Ireland as well as to England. See 2 vol. Christian's Bank. Law, p 207.

Chancellor, and so far his Jurisdiction in Bankruptcy is appellate. His control is also continual over the Commission itself, and over the conduct of the Commissioners in its execution, as well as over their judicial Decisions. In all cases his Jurisdiction is exercised summarily. It applies to subjects of the most important consideration, especially to the commercial world; and, perhaps, the Chancellor and Vice-Chancellor, in the course of every Year, decide more important commercial questions than all the other Courts in Westminster Hall taken together; many of them of the most complicated nature, requiring nice investigation, great knowledge of Law, and that familiarity with the business which long habit only can acquire (c). An Appeal lies from the Decision of the Vice-Chancellor to the Chancellor.

It is matter of curious inquiry, in what manner the Chancellor acquired what is termed his *appellate* Jurisdiction in Bankruptcy. No Statute directly confers it. An able Writer considers the Authority exercised by him, under this appellate Jurisdiction, as *recommendatory* only, and not binding on the 592*] Commissioners, but that the Chancellor by means of his power of changing or displacing Commissioners, is thus enabled to enforce his recommendations (d).

Questions arising out of Bankruptcy are very various, and the Decisions voluminous, and have engaged the attention of several able Writers.

It is not consistent with the plan of this Work to enter into all the doctrine on this subject, but only to treat on that part of it over which the Chancellor has a distinct cognizance, and which cannot come in question in Courts of Law.

The questions, for instance, who may be made a Bankrupt? or, what is a good petitioning Creditor's Debt, are merely questions of Law, and referred to the Common Law Tribunals, when any doubt is entertained.

It frequently happens that the Chancellor sitting in Bankruptcy is obliged to call in aid, his general Jurisdiction (e). In many cases, from the magnitude of the subject, and other circumstances, the Chancellor will dismiss a Petition, and order a *Bill to be filed*. By this means an opportunity of an Appeal is given (f). But the determination in such cases is the same as if it had come before him by Petition (g). Sometimes a Petition is decided upon, but without prejudice to the Petitioner's filing a

(c) See "Observations occasioned by a Pamphlet, intitled *Objections to the Project of creating a Vice Chancellor of England*;" said to be written by Lord Redesdale, p. 50, 51.

(d) Christian's Bankrupt Law, 2d vol. 213, &c. a Work, profound, erudite, and useful. No book so stri-

kingly exhibits the fallibility of Judges.

(e) *Twoogwood v. Swanston*, 6 Ves. 485.

(f) *Ex parte Bawit*, 12 Ves. 16; and see 6 Ves. 126; and see *Bromley v. Goodere*, 1 Atk. 76.

(g) *Bromley v. Goodere*, 1 Atk. 76.

Bill (h). The *Court is always unwilling to overturn a decision when sitting on Bankruptcy, as there can be no Appeal (i).

The Chancellor, if he has doubts as to facts, often directs an Issue in Bankruptcy (k).

Commission.

THE steps preparatory to a Commission are these: The person desirous of taking out a Commission, who is usually termed the petitioning Creditor, swears to the amount of his Debt, which must be above one hundred pounds, and that he believes his Debtor is become a Bankrupt. At the same time, he executes a Bond to the Great Seal, in the Penalty of two hundred pounds, conditioned to prove the Party a Bankrupt. Where Partners are the petitioning Creditors, the Signature of the Bond by one Partner is sufficient (l). If the petitioning Creditor resides in London, or in the vicinity, he must make an affidavit before a Master in Chancery, and execute at the Bankrupt Office the Bond to the Chancellor. When the Affidavit and Bond are delivered at the Office, and the entry is made in the Docket Book, this constitutes what is termed, *striking a Docket*. No Docket is to be considered as struck until the same is entered in the Docket Book (m).

They will not at the *Bankrupt's Office* allow a Docket to be struck against a Man thus: "Jacob *Stevenson, otherwise [*594 *Stephenson*]," but the Court on application, has allowed such a Docket (n).

Two Creditors, whose Debts amount to one hundred and fifty Pounds, or three Creditors, whose Debts amount to two hundred Pounds, may in like manner obtain a Commission.

The Affidavit made on suing out the Commission, must show a true and real Debt; but it need not state the Debt with the precision of a Special Pleader, bringing an Action on it (o). Upon the opening of the Commission, the Commissioners are directed to require the personal appearance of the petitioning Creditor, and to examine him concerning the nature and condition of the Debt (p); the Court sometimes dispenses with this, upon an application supported by Affidavit.

If instructions to strike a Docket are received from the Country on Sunday by a Solicitor, who before the Bankrupt Office opens on the following morning, receives similar instructions

(h) Ex parte Hunter, 1 Atk. 225.

(i) Ex parte West, 1 Bro. C. C. 75.

(k) He did so in ex parte Knott, 11 Ves. 621.

(l) Ex parte Hodgkinson, Coop. 94. S. C. 19 Ves. 293.

(m) See Lord Erskine's Order, 29th of December, 1806.

(n) Stevenson's Case, 19 Ves. 277.

(o) Ex parte Bryant, 1 Ves. & Bea. 214.

(p) Cook's Bankrupt Law, 1 vol. p. 7. 6th edit.

from another Client, they must draw Lots, as is done upon two applications to the office at the same instant (*q*).

By Lord Apsley's order (*r*), if a Docket is struck, and no Commission is issued thereon, in less than four days another Commission may issue; but a contrary practice had obtained 595*] (*s*): and by a subsequent *General Order (*t*) of Lord Erskine, it is ordered, that in case any Person striking a Docket, shall not within fourteen days next after such Docket shall be struck, order a Commission to be sealed at the then next public Seal, in case there shall be a public Seal within seven days next after such Docket shall be struck, or by a private Seal, within eight days after the striking of such Docket, and shall not cause the same to be sealed accordingly, then that any Person may be at liberty to sue out a Commission, without any notice being given to the Person who shall first have applied for such Commission. The fourth day being a holiday does not prevent the operation of the Rule (*u*). Taking *Monday* as the fourth day, if there are public Seals on *Tuesday* and *Thursday*, the words of the Order are held to mean *Tuesday*. The Order does not say, "at any public Seal within the Day," but "at the next public Seal;" which Words, if there are but two public Seals within the period mentioned, must mean the first day on which the Commission ought to be sealed (*x*).

A Commission of Bankruptcy opened, and acted upon, cannot be altered, even to correct a clerical mistake (*y*); and where the Commission had been opened, and the Commissioners qualified, and the Proof of the Act of Bankruptcy failed, and, afterwards, the petitioning Creditor procured Evidence of another Act of Bankruptcy subsequent to the Date of the Commission, a 596*] new Commission was held necessary* (*z*). It seems, that before the Commission had been opened, and acted upon, the Chancellor will allow an alteration, where there has been an innocent mistake of a Name (*a*); though in one Case it was observed, that when once the Great Seal is put to a Commission it cannot be altered, more than any other Deed (*b*).

By a general Order (*c*), a Commission sued out and to be executed in *London*, is supersedable for want of prosecution at the expiration of fourteen days; and if sued out, and to be executed in the Country, is supersedable for want of prosecution at the expiration of twenty-eight days; but particular circumstan-

(*q*) Hay's Case, 13 Ves. 197.

(*r*) 12th February, 1774.

(*s*) See ex parte Leicester, 6 Ves. 433.

(*t*) 29th December, 1806.

(*u*) Ex parte Cooper, 12 Ves. 418.

(*x*) Ex parte Hyne, 19 Ves. 62.

(*y*) Fiaber's Case, 10 Ves. 190. Burrow's Case, ib. 286.

(*z*) Ex parte Twaites, 13 Ves. 325.

(*a*) See Burrow's Case, 10 Ves. 286.

(*b*) Ex parte Thomson, 9 Ves. 208. S. C. MS.

(*c*) 26th June 1793, explained by Order, 5th Nov. 1793. On the construction of this Order, see ex parte Ellis, 7 Ves. 135.

ces, it seems, may take the Case out of the general Order ; such as the sickness of a Commissioner, or a Witness, or a Witness prevented attending by accident, or where Evidence has been kept out of the way (*d*), or the Solicitor who sued out the second Commission was aware that the first was really intended to be prosecuted (*e*).

A Commission has been ordered to be opened near four Months after its date, the delay being occasioned, not by the petitioning Creditor, but the Bankrupt (*f*).

A Commission of Bankruptcy is a proceeding at Law in the first instance (*g*), and is a matter of right (*h*), *and as much [*597 *ex debito Justitiæ* as a Writ (*i*) ; for though the words of the act of Parliament are that the Chancellor *may* grant a Commission, yet that is, in effect, *must* (*k*) ; but it seems discretionary in the Chancellor whether he will seal the Commission at a *private Seal* (*l*).

Any Person, therefore, striking a Docket, and giving the Bond to the Chancellor, as required by the Act of Parliament, has a right to take out a Commission of Bankruptcy, and to have the Adjudication, if the trading, the act of Bankruptcy, and the petitioning Creditor's Debt are proved, and there is no preventive remedy, a *caveat* against the issuing of a Commission not being allowed (*m*). If the Commission has been taken out without foundation, compensation may be sought by an Action on the Case, or upon the Bond, if a Case for assigning the Bond, or supporting an Action, can be established (*n*).

If, however, there be no sufficient act of Bankruptcy proved, and yet there is an Adjudication of the Party as a Bankrupt, the Chancellor will, on application, *suspend the Advertisement in the Gazette*, and supersede the Commission, or direct an Issue ; or, if expedient, refer it back to the Commissioners to consider, upon the Evidence before them, whether they would declare him a Bankrupt (*o*). A Bankrupt is *permitted to petition [*598 against the Commission in *forma pauperis* (*l*).

If it be doubtful whether a Party be a Trader within the meaning of the Statutes, the Chancellor will, on application, order the Commissioners not to issue any Warrant of Seizure against the Petitioner's Effects, or summon him to surrender, until an *Issue* has been tried whether he was a *Trader* (*m*) ; or the Court in such case will direct an *Action* to be brought by the Bankrupt, and will stay proceedings in the mean time (*n*).

(*d*) *Ex parte Freeman*, 1 Ves. & Bea. 34, 38, 42. 63. *Ex parte Cridland*, 3 Ves. & Bea. 98.

(*e*) *Ex parte Sandon*, 1 Rose, 84.

(*f*) *Harrison's Case*, 3 Ves. & Bea. 174.

(*g*) *Ex parte Gulston*, 1 Atk. 138.

(*h*) *Backwell's Case*, 2 Ch. Cas. 190. See *ex parte Browne*, 18 Ves.

(*i*) *Ex parte Wilson*, 1 Atk. 218.

(*k*) *Backwell's Case*, 1 Vern. 152. S. C. 2 Ch. Cas. 191.

(*l*) See *ibid.* 153.

(*m*) *Ex parte Parsons*, 1 Atk. 72.

(*n*) *Ex parte Lanchester*, 17 Ves. 512.

If he fails in the Action, as the Costs cannot be given against the Bankrupt, the Persons sustaining the Commission are allowed to take them out of the Estate (*o*).

Where the Court has directed an Action to be brought by the Bankrupt to try the Bankruptcy, and the Bankrupt has failed in the Action, the Court will not prevent him bringing another; but it will take no part (*p*), and will not stay the Proceedings merely because the Bankrupt has brought a second Action (*q*). If, however, he tries the question *vexatiously*, the Court will, by Injunction, interfere to restrain him; but a *second* Action merely, does not constitute that vexation.

If the Adjudication of Bankruptcy be supported by clear Evidence, the Chancellor will not interpose, whatever might be the nature of the case (*r*).

599*] *If a Commission is granted, and the Bankrupt dies, the Commission may yet proceed (*s*), provided he has been declared a Bankrupt (*t*).

Formerly, on the death of the King, a Commission is abated, but it might be renewed, though the Bankrupt was dead (*u*), and the Commissioners proceeded from where they left off (*x*); but by the 5th Geo. 2, c. 30, it is provided, that Commissions shall not abate by the death of the King.

If it appears that a Commission has been *fraudulently* taken out, and the Solicitor a Party to the Fraud, Costs will be given as between Attorney and Client, and the Attorney will be committed (*y*).

The Commission is directed to *Commissioners* mentioned in the Commission, to execute the same; and they are considered as a *Court of Justice* (*z*). Formerly, it seems, the Commissioners were discretionally named by the Chancellor, to act under the particular Commission, and were not confined to Persons in the Profession of the Law (*a*). But now, Persons, usually Barristers, are specially appointed for this purpose, divided into Lists, to some one of which Lists every Commission is directed. The nomination of Commissioners is always with *the permission*

(*o*) See *Gulston v. Dale*, 1 Atk. 195; and see *ex parte Parrons*, 1 Atk. 204.

(*t*) *Ex parte Northam*, 2 Ves. & Bea. 124.

(*m*) *Ex parte Parsons*, 1 Atk. 72.

(*n*) *Ex parte Bryant*, 1 Ves. & Bea. 217, 218.

(*o*) *Ibid.* 213.

(*p*) *Vid. ex parte Bryant*, 1 Ves. & Bea. 215, 216, 220.

(*q*) *Ibid.* 220.

(*r*) *Ex parte Foster*, 17 Ves. 414; and see *ex parte Fletcher*, 1 Ves. & Bea. 350.

(*s*) 2 Cha. Cas. 193.

(*t*) *Ex parte Beale*, 2 Ves. & Bea. 29.

(*u*) *Bromley v. Goodere*, 1 Atk. 77.

(*x*) 2 Chan. Cas. 193; and see *ex parte Lee*, 1 Cox, 393.

(*y*) *Ex parte Thorpe*, 1 Ves. jun. 394.

(*z*) *Kinder v. Williams*, 4 Term Rep. 377. *contra*, was corrected in *Arding v. Flower*, 8 T. R. 534, and by the Lord Chancellor in *ex parte King*, 7 Ves. 312; *ex parte Temple*, 2 Ves. & Bea. 395.

(*a*) See what is said by the Lord Keeper in *Blackwell's Case*, 1 Vern. 154, and S. C. 2 Cha. Cas. 143, 190; but not as to this point.

*of the Court, and not a matter of right in the Persons taking out the Commission (e).

The Fees of the Commissioners are fixed by Act of Parliament (f), and are payable by the Attorney to the Commission; and if not paid, he will, on Petition, be ordered to pay them (g).

An Action will lie against Commissioners if they exceed or abuse their Authority (h); and the Chancellor may remove Commissioners if they act improperly, and will order them to pay Costs if they act out of the course of their duty as Commissioners (i).

If the Commission is to be executed in the country, there must be named, as Commissioners, two Barristers, resident at or near to the place where such Commission is to be executed; nor in such case can any Person be a *Quorum Commissioner* unless he be a Barrister (k).

In one Case, Lord Eldon seems to have had some doubt whether the act of striking a Docket alone would bring the Party within the penal clause of the Act 5. Geo. 2, c. 30, s. 24 (l); but he afterwards decided it would not (m).

In a Case, where a Commission of Bankruptcy was relinquished by the petitioning Creditor, upon obtaining a security, the Chancellor superseded that Commission, and ordered his Debt, proved under another Commission, to be expunged (n).

*The knowledge of one or two individual Creditors, if [*601 there be no general Communication, does not prevent the effect of the Stat. 5. Geo. 2 c. 30, s. 24 (o).

If a Commission is maliciously sued out, the Party may either petition the Chancellor to assign the Bond, (a matter in his discretion,) or bring an Action (p).

Until Assignees are chosen, the petitioning Creditor, in pursuance of the Statute (q), pays the Costs of prosecuting the Commission, including the Costs of the Assignment, and of the day when Assignees are chosen (r); and the Assignees, when chosen, are bound to re-imburse him out of the first Monies which come to their hands. The Statute directs the Commissioners to settle the Amount of the Costs so payable; but this does not prevent the Chancellor, upon Petition, referring it to a Master in Chancery, to tax them, if there should appear to be reasonable

(e) Anon. MS.

(f) 5 Geo. 2, c. 30, s. 42.

(g) Ex parte Griffith, 1 Madd. Rep. 56. S. C. 2 Rose, 342.

(h) 4 Inst. 277. Miller v. Scare, 2 Bl. 1144.

(i) Ex parte Scarth, 15 Ves. 293.

(k) Chanc. Order, 12th Aug. 1800, prefixed to 5 Vol. Ves.

(l) Ex parte Paxton, 15 Ves. p. 462. See also 14 Ves. 85.

(m) Ex parte Browne, 15 Ves. p. 472.

(n) Ex parte Paxton, 15 Ves. p. 461.

(o) Ex parte Paxton, 15 Ves. p. 461.

(p) Brown v. Chapman, 3 Burr. 1416. See post.

(q) 5 Geo. II. c. 30. s. 25.

(r) Christian's Bank. Law, 1st. vol. p. 247.

objections to the allowance made by the Commissioners (*s*). If the Funds in the hands of the Assignees are insufficient to pay the Costs of the Petitioning Creditor, he must pay them himself (*t*).

Joint and Separate Commissions.

If a *joint Commission* issues against several Partners, a subsequent *separate Commission* is invalid. So, if a *separate Commission* be first issued, a subsequent *joint Commission* will be a 602*] nullity, one of the *Parties being already a Bankrupt under a prior Commission (*t*). Unless therefore it was the effect of amicable arrangement, to which the Creditors, both joint and separate, lent themselves, Lord Eldon thought it very difficult to conceive how any Person could effectually proceed at Law, under the second Commission, either for civil or criminal purposes. A Commission of Bankruptcy, he observed, is the *Right* of the Subject; nor has the Person taking out the first Commission ever been made to pay the Costs of superseding it; nor have the Costs been refused to him unless it was taken out against good faith; that is, by counteracting an endeavour to produce an arrangement without a double expense (*u*). If, therefore, a separate Commission be superseded, it will only be on the terms of giving the Party taking out the separate Commission all the rights of a joint and separate Creditor, accompanied with an Order that he shall prove as a joint Creditor, if he thinks proper (*x*).

Where a *separate Commission* of Bankruptcy was issued in *Ireland*, and afterwards a *joint Commission* was issued in *England*, the Chancellor refused to supersede the joint Commission; throwing out at the same time great doubts as to its validity (*y*).

Nothing is said in any of the Acts relating to Bankrupts, as to the *separate Creditors* of a Partner (*z*); but this silence is amply supplied by decision. Under a joint Commission of Bankrupt, the affairs of the separate Creditors may be arranged, and also 603*] *of separate Firms of two or more of the Partners (*z*).

Joint Creditors will upon Petition be allowed to prove, under a separate Commission, for the purpose of assenting to, or dissenting from, the Certificate (*a*), and of sharing the surplus, if any, of the separate Estate, after the separate Debts are satis-

(*s*) *Ib.* and *Ex parte Vincent*, 24 March, 1786. *Ex parte Clarke v. Cogan*, 29 May, 1789, cited 1 Cooke's Bank. Law, p. 12. edit. 6.

(*t*) *Sic dict.* *ex parte Roscoe*, 1 Meriv. 190.

(*u*) *Ex parte Browne*, 18 Ves. 64. *Ex parte Cook*, 2 P. Wms. 500. *Ex parte Crew*, 16 Ves. 236.

(*u*) 18 Ves. 64, 5.

(*z*) *Ib.* 66.

(*y*) *Ex parte Cridland*, 3 Ves. & Bea. 94.

(*z*) See *Taylor v. Field*, 4 Ves. 397.

(*z*) *Ex parte Bonbonus*, 8 Ves. 545. *Ex parte Rawson*, 10 Ves. 163.

(*a*) 1 Atk. 96, 138.

sed (b); but none of the joint Creditors are allowed to vote in the choice of Assignees (c) under the separate Commission, unless where the petitioning Creditor, under the separate Commission, is a joint Creditor and consents, and the only separate Debt is under 10*l.* (d); or where the petitioning Creditor, under a separate Commission, is a joint Creditor, whose Debt overbalances the separate Debt and consents (e); nor are the joint Creditors permitted to receive Dividends out of the separate Estate (f), with the exception (a singular one) of a joint Creditor, who happens to be the petitioning Creditor under such a Commission (g), he having lost his remedy at Law; and this, though, as to part of the Debt he proves, he is *a Trustee for another joint Creditor (h). The exclusion of the joint Creditors, in the proof of Debts, seems founded on the principle, that where a Person has two Funds to which he may resort, the Court will not allow him to attach himself upon one Fund, to the prejudice of those who have no other, and to neglect the other Fund (i); and therefore the joint Creditors are not excluded from proof where there are no joint Effects (k), and no solvent Partner (l), or no separate Debts (m); or where it is ascertained what is the Amount of the separate Debts, and the joint Creditors agree to pay the separate Creditors, twenty Shillings in the Pound (n).

Where, however, there is a bankruptcy among Partners, concerned also in other Trades, the Paper of one Firm being given to the Creditors of another, Dividends are allowed out of both Estates (o). So, where a joint Debt of four Partners was paid by a Bill, drawn by one of the Debtors, and accepted by another, each carrying on distinct Trades, proof was permitted under their separate Commissions upon such Bill (p).

Under a separate Commission of Bankruptcy against one

(b) *Horsey's Case*, 3 P. Wms. 25. The practice has varied, but is now as stated. See *Heath v. Hall*, 4 Tannt. 322.

(c) *Ex parte Atlock*, 11 Ves. 603. *Ex parte Simpson*, 1 Meriv. 38. As the joint Creditors in such case cannot vote in the choice of Assignees, the Chancellor has sometimes appointed an *Inspector* to attend to their interest, and ordered his Expenses to be paid out of the Estate. *Mills ex parte*, 3 Ves. & Bea. 140. But the application for an *Inspector* cannot be made until after the choice of Assignees. *Ex parte Simpson*, 1 Meriv. 38.

(d) *Ex parte Jones*, 18 Ves. 283.

(e) *Taylor*, *ex parte*, 90, 284.]

(f) *Ex parte Bevan*, 9 Ves. 227. But this was not so formerly; see *Crisp and Perrit*, Willes's Rep. p. 467.

(g) See *ex parte De Tastet*, 17 Ves. 250. *Ex parte Akerman*, 14 Ves. 604, and the Cases there referred to.

(h) *Ex parte De Tastet*, 17 Ves. 247.

(i) See *Ex parte Elton*, 3 Ves. 240.

(k) See *Ex parte Harris*, 1 Madd. Rep. 583.

(l) *Kensington ex parte*, 14 Ves. 447. *Ex parte Hayden*, 1 Bro. C. C. 454, and see *ex parte Machell*, 2 Ves. & Bea. 216.

(m) See 1 Atk. 227.

(n) *Ex parte Tailt*, 16 Ves. 197, and *ex parte Chandler*, 14 Ves. 35, and see *ex parte Abell*, 4 Ves. 837, and see *ex parte Hubbard*, 13 Ves. 424.

(o) *Ex parte Bonbonus*, 8 Ves. 546.

(p) *Ex parte Wenslay*, 2 Ves. & Bea. 254. S. C. 1 Rose, 254.

Partner, (the other Partners remaining solvent,) an Account is 605*] directed of the joint Estate, *even in the absence of the other Partners ; and upon the application of any one joint Creditor, whether the others choose it or not, the whole Account being taken in the Bankruptcy (q), the joint Creditors will be paid *pari passu* out of the joint Estate, and the residue distributed only according to the respective interests of the Partners (r). "This," says Lord Eldon, "is done every day, though how it originally became Law, I do not know (s)."

A Commission may issue against one of three Partners, for a joint Debt, though an action cannot be maintained against one Partner only (t).

A *joint and separate Commission* were before the time of Lord Hardwicke (u) permitted to stand together, at the hazard of all the inconvenience that might arise with reference to legal questions ; but now, if the joint Commission can be sustained, it stands ; and the Assignees can at Law recover both the joint and separate Estate, and by Order under that Commission, the same distribution is made as if both Commissions stood (x).

The joint Creditors are first paid out of the Partnership or joint Estate, and the separate Creditors out of the separate Estate of each Partner ; and if there be a surplus of the joint Estate beyond what will pay the joint Creditors, the same is applied to *pay the separate Creditors ; and if, on the other hand, there be a surplus of the separate Estate beyond what will satisfy the separate Creditors, it goes to supply any deficiency that may remain as to the joint Creditors (y).

Formerly, without a specific Order, a *separate* Creditor could not prove under a joint Commission (z) ; but now there is a *general Order* for that purpose (a).

A Creditor, by a *joint and several* Obligation, may prove either upon the joint or the separate Estate, but not upon both (b), the reason of which is not very intelligible (c). It is, however, settled, he must *elect*, and when he has once elected to go under the joint Estate, his fate is the same as that of all the other joint Creditors, and he has no preference to them in case of a surplus of the separate Estate beyond the separate Debts (d).

(g) *Ex parte* Voguel and others, 1 Atk. 131.

(r) *Dutton v. Morrison*, 17 Ves. 209 ; and see *Taylor v. Field*, 4 Ves. and *Everett v. Backhouse*, 10 Ves. 98.

(s) *Barker v. Goodair*, 11 Ves. 86.

(t) *Ex parte* Crisp, 1 Atk. 133.

(u) See in the Matter of *Simpson*, 1 Atk. 138. Sed. vid. *Ex parte* Cook, 2 P. Wms. 500.

(z) *Ex parte* Martin, 23 Ves. 116.

Ex parte Rawson, 18 Ves. 163. *Ex parte* Cridland, 3 Ves. & Bea. 99.

(g) *Ex parte* Cook, 2 P. Wms. 500.

Horsey's Case, 3 P. Wms. 25.

(z) *Ex parte* Sandon, 1 Atk. 68.

Ex parte Bandier, ib. 97.

(a) General Order, 8th March, 1794. See 4 Bro. C. C. 548.

(b) *Ex parte* Bond and Hill, 1 Atk.

98. *Ex parte* Banks, ib. 106.

(c) See *Ex parte* Bevan, 10 Ves.

108.

(d) *Ib.* 109, 110.

Where a separate Creditor proved on the joint Estate, (after he had had time to look into the accounts of both Estates) (e), he was allowed, on Petition, to waive his proof, and prove under the separate Estate, but not to disturb a Dividend previously made (f).

Separate Creditors who have taken a *joint Security*,* [*607 may prove against the separate Estate, on giving up the joint Security (g).

Where there is a Partnership, and *separate Debts*, the Partnership is not admitted a Creditor upon any individual Partner, nor any individual Partner upon the Partnership, until the Creditors of the individual Partner, and the Creditors of the Partnership, are satisfied to the extent of Twenty Shillings in the Pound out of the respective Estates.

Lord *Hardwicke* decided, that if the joint Estate lent Money to the separate Estate of one Partner, or if one Partner lent to the joint Estate, proof might be made by the one, or the other, in each Case; but this doctrine does not now prevail; and the consequence is, that if one Partner lends 1000*l.* to the Partnership, and it becomes insolvent in a week after, he cannot prove as a Creditor of the Partnership, though the Money was supplied to the joint Estate; so, if the Partnership lends to an individual Partner, there can be no proof by the joint against the separate Estate: that is, in each case, no proof to affect the Creditors: though the Individual Partners have the right as against each other; but if it is shown that the Effects, joint or separate, have been acquired by the other *improperly and fraudulently*, in such case proof is allowed (h).

It is settled (i), that where the separate Creditors are paid Twenty Shillings in the Pound, and there is a Surplus, that surplus shall not go *immediately to pay Interest to the separate Creditors, but is applicable to make the joint Creditors equal with them as to the Principal (k).

If it be proved that there is another Partner, known to the world, a joint Commission, not including him, would be bad, (l); but if there be a dormant Partner, who is not an ostensible contracting Party, the Creditor, though he may, if he chooses, is not bound, to go against him (m).

If there be a dormant Partner, by a share of the Profits, but the property by agreement belongs exclusively to the other, a joint Commission cannot be supported (n).

Where one Partner is an *Infant* or a *Lunatic*, a joint Com-

(e) Ex parte Bond and Hill, 1 Atk. 99.

(f) Ex parte Beilby.

(g) Ex parte Lobb, 7 Ves. 592.

(h) Ex parte Harris, 2 Ves. & Bea. 212, 213. Ex parte Assignees of Lodge and Fendall, 1 Ves. jun. 166. Young ex parte, 3 Ves. & Bea. 31.

(i) Ex parte Clarke, 4 Ves. 677.

(k) Ex parte Reeve, 9 Ves. 690.

(l) Ex parte Benfield, 5 Ves. 426. Allen v. Downes, Willes, 474, in note.

(m) Ex parte Hamper, 17 Ves. 412.

(n) Ex parte Hamper, 17 Ves. 403.

mission cannot be sued out against the others ; separate Commissions, in such Cases, must be resorted to (o).

Separate Creditors cannot come upon the joint Estate for a Sum brought into the Partnership by one Partner, beyond his Share, for Creditors rely upon the ostensible state of the Fund (p).

A separate Commission of Bankruptcy has been established, though the other Partner died before the Assignment (q).

609*]

*Supersedes of Commission.

NONE of the Bankrupt Statutes give any direction as to the *superseding* of Commissions, except where the Petitioning Creditor privately receives part of his Debt ; in which Case, it is expressly declared that the Commission shall and may be superseded, giving the right to the Party, and leaving no discretion in the Chancellor. As to all other Cases, the Court is in the habit of considering a Commission of Bankruptcy as, what it is frequently called, a *species of Execution*, (for it is not an Execution in the strict sense) (r), and over that species of Execution the Court conceives itself to have the same discretionary power as other Courts have over Executions, to prevent an unlawful use of the Law (s).

A Commission cannot be superseded before it is sealed ; but if the Petitioning Creditor delays sealing it, and urges the want of the sealing to prevent the supersedeas, the time for sealing it will be limited to three days (t).

A Bankrupt, though under Commitment, may petition to supersede the Commission (u).

A Petition to supersede a second Commission must be served on the Assignees under the first (x).

A Bankrupt cannot supersede his Commission by impeaching 610*] the Petitioning Creditors Debt, on the *ground of a Security taken privately, provided against by the Statute (x).

If by the Payment of one who was a Surety with the Bankrupt, the Petitioning Creditors Debt, is reduced under 100%, before the issuing of the Commission, it will be superseded (y).

The Court will not supersede a Commission, without directing an Issue, unless it appears very plainly to be taken out *fraudulently or vexatiously* (z) ; but if it be a plain case the Court

(o) Ex parte Layton, 6 Ves. 440.

(p) Ex parte Assignees of Lodge and Fendall, 1 Ves. 166.

(q) Ex parte Smith, 5 Ves. 952.

(r) See Ex parte Brown, 1 Ves. & Bea. 66.

(s) Ex parte Freeman, 1 Ves. & Bea. 10, 41.

(t) Ex parte Williams, 2 Ves. & Bea. 255.

(u) Ex parte M'Ginnis, 18 Ves. 289. S. C. 1 Rose, 60, 84.

(x) Ex parte Irvine, 1 Madd. Rep. 74.

(y) 5 Geo. II. c. 30. s. 24. Ex parte Kirk, 15 Ves. 464 S. P. Anon. MS.

(y) Ex parte Meers, 25 June, 1808.

MS.

(z) Ex parte Wilson, 1 Atk. 218.

will order Superseders, though the Petitioning Creditor desires an Issue or an Action (a).

If an offer be made to secure the Payment of all the Debts proved under the Commission, by Property immediately available to the Creditors; or if it appears that a part of the Bankrupt's Estate will pay all his Creditors, the Commission will be superseded (b). It is the same if the Creditors agree to take a *Composition* for their Debts. But by a recent *General Order*, 21st August, 1818 (c), no Commission of Bankruptcy can be superseded on consent of Creditors until after the *second Meeting*; and the Commissioners being satisfied at such Meeting that a Petition to supersede will be presented, and consented to by the Creditors who had proved Debts, are to adjourn the choice of Assignees, to give an opportunity of presenting the Petition.

*Generally, it is true, as before observed that a commission of Bankruptcy cannot be supported by a Trading during *Infancy* (e); but where a Bankrupt, who had held himself forth to the World as an Adult, and *na jure*, and trading as such, contracted Debts to a considerable Amount for two Years previous to his Commission, it was held, he was not entitled to have his Commission superseded, the Supersedeas being opposed by the Creditors, and was left to his remedy at Law (f).

A joint Commission of Bankruptcy has been superseded on the ground of the *Infancy* of one Partner, on the Petition of the Assignees under a separate Commission (g).

Where a Commission of Bankruptcy is superseded, and an Action is brought by the Person made Bankrupt, the Lord Chancellor, on Petition, will order the Commission and Proceedings, to be delivered by the Solicitor to the Secretary of Bankrupts, and by him to the Associate, to be produced on the Trial; with liberty to inspect and copy the same (h).

A *Lunatic*, it seems, may be made a Bankrupt (i), provided the Act of Bankruptcy was committed when he was Sane (k).

Before the last Order of the 21st August 1818, a Commission might be superseded, with the Consent* of the *Petitioning Creditor* (l); but where such Creditor upon receiving his Debt, superseded the Commission, without an application to the Court, he was ordered to refund (m).

(a) Ex parte Gallimore, 1 Madd. Rep. 67.

(b) Ex parte Bryant, 1 Ves. & Bea. 216, 220.

(c) See the Order, 3 Madd. Rep. 392.

(e) Ex parte Moule, 14 Ves. 603. Ex parte Sydebotham, 1 Atk. 146.

(f) Ex parte Watson, 16 Ves. 266.

(g) Ex parte Henderson, 4 Ves. 163. Ex parte Barwis, 6 Ves. 601.

(h) Ex parte Warren, 19 Ves. 162.

(i) Anon. 13 Ves. 590; but see ex parte Layton, 6 Ves. 438.

(k) Ex parte Priddey, mentioned, 1 Cooke's Bankrupt Law, p. 42.

(l) Ex parte Trigwell, 1 Ves. & Bea. 348. Backwell's Case, 1 Vern. 208. S. C. 2 Chan. Cas. 196.

(m) Ex parte Thomson, 1 Ves. jun. 157.

Where a Person after suing out a Commission kept it by him for six Months, without proceeding on it, it was ordered to be superseded (n).

On the Petition of a Person found a Bankrupt, to supersede the Commission against him, on the ground that he has committed no act of Bankruptcy, the Court, though there is no Affidavit on the other side, in support of the Commission, or Notice that the Proceedings be produced, will look into the Proceedings to see if there is an act of Bankruptcy (o).

An Order for a *Supersedeas* has no effect until the Writ issues (p); and the Writ is not considered as sealed for the purpose of proceeding on it while in the Chancellor's hands, but only from the time when delivered to the Messenger (q). By a Regulation, sanctioned by the Legislation, the Writ, on paying a larger Fee, may be *privately sealed*, and the party may choose for himself whether he will have it more or less speedily (r).

Where a Commission was superseded for *Fraud*, and nothing 613*] done under it, and the Petitioning Creditor* was not to be found, the Assignees, though not privy to the Fraud, nor possessing any of the Effects, were ordered to reimburse the Messenger the Expense subsequent to the choice of Assignees, but not the Expense previously incurred (s).

Formerly, the Chancellor, on the application of third Persons, Creditors, was often obliged to supersede Commissions on the ground of a prior secret act of Bankruptcy, if there were Debts existing at the time of the former act, upon which a Commission might be sued out (t). This often proved extremely hard on Assignees, Purchasers, and others. By a late Act (u), this inconvenience is remedied; and it is provided, that no Commission of Bankruptcy shall be avoided by an act of Bankruptcy committed prior to the contracting of the Petitioning Creditor's Debt, if he had not notice of such act of Bankruptcy, when the Debt to him was contracted: the issuing of a former Commission, though afterwards superseded, to be deemed notice, if it shall appear that an act of Bankruptcy had been actually committed (x).

A Commission of Bankruptcy is never superseded where there have been *Purchasers* under it (y), unless the Purchases

(n) Ex parte Puleston, 2 P. Wms. 555, approved in ex parte Freeman, 1 Ves. & Bea. 41.

(o) Ex parte Vypond, 1 Madd. Rep. 624.

(p) Ex parte Leicester, 6 Ves. 429. Ex parte Layton, ib. 439.

(q) Ex parte Freeman, 1 Ves. & Bea. 38, 9.

(r) Ex parte Leicester, 6 Ves. 432.

(s) Ex parte Hartop, 9 Ves. 109.

(t) See 2 Esp. N. P. 595, 597, in note, and what is said in Bullock's Case, 1 Taunt. 89.

(u) 46 Geo. III. c. 135. s. 5.

(x) Lord Eldon was of opinion that this latter clause would have been better omitted. Ex parte Bullock, 14 Ves. 466. It did not form part of the Act, as originally proposed.

(y) Ex parte Edwards, 10 Ves. 104.

are confirmed (z); and even where there is no real Estate, the Court will not, it seems, *except from necessity, supersede [*614 a Commission, especially if the Commission has proceeded in the usual way, and all the Creditors have acquiesced in it, and the whole is completely finished (a); because, by so doing, every thing done under it is void, and Assignees are left responsible (b).

A Commission of Bankruptcy has been ordered to be superseded to defeat a Prosecution for omitting to surrender under circumstances of erroneous advice, there being no fraud in the case, and another Commission issued and proceeding (c).

Where a Bankrupt had been convicted of fraudulently embezzling Property to the amount of 20*l.* and afterwards presented a Petition to the Lord Chancellor to supersede the Commission, it was decided, that a Person attainted could not be heard as a Suitor in prosecution of a *civil Right*, but only for the mere purpose of reversing the Attainder; and on that ground the Petition was dismissed (d).

A Commission will be superseded on account of a *misdescription* of the Bankrupt (e); but not if he is well known as described in the Commission (f).

*A Commission issued to a Place where there were [*615 only two Creditors, and distance two hundred Miles from the great body of the Creditors; this was held, not to be a ground for a Supersedeas; but the time was enlarged for the choice of Assignees (g).

We have already observed on the remedy where a Commission is maliciously sued out (h).

It is very common to pray, not only that a Commissioner may be superseded, but also, that the Bond may be assigned; and the Bond will be assigned where the Commission is fraudulently and maliciously taken out (i), even, as it hath been holden, at the instance of a Creditor (k). But as the Court of King's Bench has determined that where the Bond is assigned, the

(a) See *Ex parte Rawson*, 18 Ves. 164, and see *Ex parte Milner*, 19 Ves. 204.

(g) *Ex parte Desanths*, 1 Atk. 146.

(b) *Ex parte Jackson*, 8 Ves. 533.

(c) *Ex parte Lavender*, 18 Ves. 18; and see *ex parte Wood*, 1 Atk. 19.

(d) *Ex parte Bullock*, 14 Ves. 452. 1 Taunt. Rep. 82. See 3 Inst. 215.

Mr. Justice Foster says, "If a Person under an Attainder be beat or maimed, or a Woman in the like circumstances ravished, they may, after a Pardon, maintain an Action, or Appeal, as their cases respectively may require. And though before a Pardon they are disabled to sue in their own names, I make no doubt

that they are entitled to prosecute, according to the nature of their respective cases, in the name of the King, who will do equal right to all his Subjects." *Foster's Crown Law*, p. 63.

(e) In *re Gordon*, and *ex parte Marsden*, 2 Madd. Rep. 13, in note.

(f) *Ex parte Horsley*, 2 Madd. Rep. 11.

(g) *Ex parte Fellows*, 2 Madd. 141.

(h) *Ante*.

(i) See *ex parte Mackerness*, 1 P. Wms. 260.

(k) 3 East, 22; but that decision has been contradicted; see *ex parte Bumford*, 2 Mad. Rep. 1.

Commission must be supposed to be maliciously taken out, and the sum of 200*l.* must be recovered (*l*), (*Lord Hardwicke* seems to have been of a different opinion) (*m*) the Chancellor will not assign the Bond where there is nothing wilful in the petitioning Creditor's conduct, nor even where he has a strong suspicion of the Party's motives: he must be judicially sure the Party acted with malice before he will assign it (*n*); but he sometimes supersedes the Commission without prejudice to an Action (*o*), and sometimes directs the Bond to stand as a security for Costs: and in *a Case where the Petitioning Creditor had himself become a Bankrupt, he directed the Bond to be considered as a security for a stated sum (30*l.*) for Costs (*p*). *Lord Hardwicke* held, that it was in the breast of the Court, where the Bankruptcy was in a doubtful case, and the Commission superseded, either to direct an Inquiry before a Master, of the Damages sustained by the Bankrupt, or a *quantum damnificatus* upon an Issue at Law; and that after the Damages were settled, the Court might, for the better recovery thereof, order the Bond to be assigned (*q*).

Where the Bond is assigned the Obligor has no Defence; the Commission must be taken to be malicious, but the Damages cannot exceed the penalty of the Bond. In an Action on the Case (in some respects a better remedy), the Plaintiff must prove malice, but the Damages are unlimited (*r*). He cannot bring an Action on the Case, and on the Bond, the former would be a waiver of the latter (*s*).

A separate Commission will not be superseded at the instance of the Creditors under a joint Commission, if the joint Commission cannot be sustained (*u*).

A Commission, it seems, may be superseded even after a Certificate has been obtained (*x*), but not where the application is a considerable time after the Certificate, and an application might have been made before (*y*).

617*] *Where the time for surrendering has expired, a Bankrupt cannot supersede his Commission before he has surrendered (*z*), which can only be done under an Order upon the Commissioners for the taking of his surrender; nor can he super-

(*l*) *Smith v. Broomhead*, 7 Term. Rep. 300. *Smithey v. Edmonson*, 3 East, 22. Ex parte Gaytor, 1 Atk. 144. Ex parte Macpherson, MS. 1805. S. C. 11 Ves. 417. *Holmes v. Wainwright*, 1 Swanst. 23.

(*m*) 1 Atk. 201.

(*n*) Ex parte Macpherson, 1805, MS.

(*o*) Ex parte Rimene, 14 Ves. 600.

(*p*) Ex parte Lane, 11 Ves. 416.

(*q*) Ex parte Gayter, 1 Atk. 144; and see Ex parte Hall, 1 Atk. 201.

(*r*) *Holmes v. Wainwright*, 1 Swanst. 23.

(*s*) Ibid.

(*u*) Ex parte Roberts and Wells, 1 Madd. Rep. 72.

(*x*) Ex parte Poole, 2 Cox, 226.

(*y*) Ex parte Moule, 14 Ves. 602.

Ex parte Rowdeat, 9 Rose's Rep.

(*z*) Ex parte Stokes, 7 Ves. 405.

Ex parte Jones, 8 Ves. 328. Ex

parte Jones, 11 Ves. 409; and see

Ex parte Bean, 17 Ves. 48. Anon. MS. 1807.

secede his Commission if he is under a commitment for not answering to the satisfaction of the Commissioners (a).

A former Commission may be superseded by a Creditor who himself is desirous of taking out a Commission, on the ground that it was founded on a concerted act of Bankruptcy, to which he was no Party; and it will be superseded, with Costs (b).

Where a Commission is superseded, merely because there was a defect as to the Petitioning Creditor, but no manner of doubt as to the act of Bankruptcy only the Costs of the Supersedeas were allowed (c).

If a Commission is taken out by concert with the Bankrupt, "upon all principle, and the habitual course in Bankruptcy," says Lord Eldon, "it cannot stand (d);" but it is no objection to a Commission that it was taken out by a Creditor, to prevent the Execution of another Creditor (e).

Until lately (f), the Practice was to supersede a Commission upon the consent of all the Creditors who had proved, when the application was made, though that *might be a surprise [*618 upon Creditors who intended to prove their Debts at the *second* or *third* Meeting (f); but where a Creditor declared he should be able to prove in a few days, the Court would not supersede the Commission until such Creditor had an opportunity of proving his Debt (g).

A Commission has been superseded where all the Creditors, except two, *who could not be found*, were paid their Debts, the Securities of those two Creditors being delivered up, with Receipts upon them, and their Signatures proved (h).

Where it is referred to the Master to settle what is due to the Creditors under the Commission, and on payment by the Bankrupt, the Commission to be superseded, the Creditors are entitled to Interest from the time of the Master's Report (i).

Second Commission.

It is in the discretion of the Great Seal whether a second Commission, issued against a Person who has not obtained his Certificate under the first Commission, shall be superseded or not (k).

In general, so long as the first Commission subsists, of whatever date, the second is bad, unless the Bankrupt has obtained

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| (a) Ex parte Bean, 17 Ves. 47. | (f) See General Order, ante, p. 610. |
| (b) Ex parte Bowen, 16 Ves. 145. | |
| (c) Ex parte Godwin, 1 Atk. 100. | (f) Ex parte Duckworth, 16 Ves. 418. |
| (d) Ex parte Steel, 16 Ves. 165; and see Ex parte Bowes, 11 Ves. 541. | (g) Ex parte Crisp, 1 Atk. 135. |
| (e) Ex parte Bowes, 11 Ves. 541. | (h) Ex parte King, 2 Ves. jun. 40. |
| Ex parte Arrowsmith, 14 Ves. 209. | (i) Ex parte Rooke, 1 Atk. 244. |
| Ex parte Gardiner, 18 Ves. 48. | (k) Lees, ex parte, Poulden, 16 Ves. 477. |
| Ex parte Biumer, 1 Madd. Rep. 251. | |

his Certificate (*l*). But where a Bankrupt (the Commission subsisting) has gone again into Trade, and a new Commission 619*] has issued, which *the Bankrupt has attempted to supersede, it has been held, that if Persons claiming beneficially under the old Commission did not mean to interfere with the Effects under the latter Commission, the Court would not interpose, though the difficulty would occur, that the first Commission might be set up as a bar to an Action under the second (*m*).

Upon a Petition to the Chancellor, to supersede such a Commission, it is usual for the Chancellor to direct the Petition to stand over, with notice to the Créditors under the prior Commission, and an arrangement is afterwards made (*n*).

In some Cases, where a Commission of Bankruptcy has issued against a *distant Country Bank*, and has been executed in *London*, an *auxiliary Commission* has been issued, directed to Commissioners in the Country, for the mere purpose of receiving the proof of Debts (*o*) under 20*l*. (*p*), and the proofs so taken have been ordered to be received under the Commission in London; but liberty to examine the Bankrupt under such auxiliary Commission has been refused (*q*).

Where there is a joint Commission against two Partners, each of them must be found Bankrupt; and though one of them should die, the Commission may still go on; but if one of the joint Traders be dead at the time of taking out the Commission, it is void (*r*).

620*] *No second Commission can now be sent to the *Lord Chancellor* for his signature, without a Note of what hath passed in the first (*s*).

Adjudication of Bankruptcy.

WHEN a Commission is procured, the next step is to obtain an Adjudication of the Bankruptcy by the Commissioners, and for this purpose, the *Petitioning Creditor's Debt* must be proved before the Commissioners, and also the *Trading*, and the *act of Bankruptcy*. If the Commissioners adjudge the Party not to be a Bankrupt, and the Petitioning Creditor is dissatisfied, he may petition the Chancellor; and a Person adjudicated a Bankrupt, may, before the insertion of the Advertisement in the Gazette, petition to stay the Advertisement, and for a Supersedeas of the Commission if there be ground for it (*t*). The insertion of the Bankruptcy in the Gazette is suspended only where on Inspec-

(*l*) Ex parte Proudfoot, 1 Atk. 252. Ex parte Browne, 4 Bro. C. C. 210.

(*m*) Ex parte Martin, 15 Ves. 114; and see ex parte Rhodes, 15 Ves. 543.

(*n*) Ex parte Crew, 16 Ves. 236.

(*o*) Ex parte Upham, 17 Ves. 212, and the Case in note p. 213.

(*p*) Ex parte Scott, 1 Rose, 12.

(*q*) Ibid.

(*r*) Beasley v. Beasley, 1 Atk. 97.

(*s*) Ex parte Freeman, 1 Ves. & Bea. 38, 42.

(*t*) As was done in ex parte Foster, 17 Ves. 414, S. C. 1 Rose, 42.

tion of the Proceedings no Bankruptcy is found; or under a Country Commission, to give the opportunity of producing the Evidence (u). Where the Bankrupt was abroad, the Petition has been allowed to be presented by his Son (x). If it be doubtful whether the Party was a Trader, an Issue will be directed, and all proceedings under the Commission will be stayed (y).

The Commissioners cannot, it seems, compel the attendance of persons before the Bankruptcy is declared* (z). The [*621 expired Statutes, 4 & 5 Anne, c. 17, and 5 Geo. 1, c. 24, expressly enabled the Commissioners to send for any Person, and examine them respecting any Act of Bankruptcy, and upon refusal to commit them.

The Chancellor, however, may direct Witnesses to attend the Commissioners to prove the act of Bankruptcy (a), or other requisites to support the Commission (b); and where they do not attend, they will be made to pay the Costs of not attending (c), and committed for their contempt (d).

But though the Chancellor will in these Cases order Persons to attend to prove a specific fact, for instance, the witnessing the execution of a Deed, yet where a Creditor speculates loosely upon the possible proof that might be made some way or other, by some Person or other who might be found, the Court, it seems, will not compel the attendance of Witnesses (e).

A Bankrupt's Wife cannot be examined against her Husband to prove his Bankruptcy (f); but the Bankrupt himself may, by the Statute 5 Geo. 1, be examined touching his Bankruptcy (g).

It has been said to be perfectly settled, that a *Creditor [*622 is inadmissible to prove the act of Bankruptcy (h).

A Witness, it seems, cannot claim it as a right to be attended by Counsel (i); nor will the Chancellor restrain the Commissioners in their examination (k).

A Witness summoned to attend by the Commissioners cannot be arrested, nor can detainers be effectually lodged against

(u) Tarleton, ex parte, 19 Ves. 464.

(x) Ibid.

(y) Ibid.

(z) Ex parte Jones, 1 Rose, 39; but see as to this, the observations of Mr. Christian's Bank. Law, 1st vol. p. 178, 9.

(a) Ex parte Higgins, 11 Ves. 8. Ex parte Lund, 6 Ves. 781; and see ex parte Farr, 9 Ves. 515, and particularly ex parte Jones, 17 Ves. 379; and see ex parte Cawkwell, 19 Ves. 233. S. C. 1 Rose, 313.

(b) Anon. 14 Ves. 450.

(c) Ex parte Gardener, 1 Ves. & Bea. 78.

(d) Ex parte Lund, 6 Ves. 781.

Ex parte Higgins, 11 Ves. 8.

(e) Ex parte Freeman, 1 Ves. & Bea. 41.

(f) Ex parte James, 1 P. Wms. 610.

(g) Ibid. 611.

(h) Ex parte Osborne, 2 Ves. & Bea. 179. S. C. 1 Rose's Bankrupt Cases, 387; but see Williams v. Stevens, 1 Camp. N. P. Cases, p. 152.

(i) Ex parte Parsons, 1 Atk. 204.

(k) Ex parte Bland, 1 Atk. 205.

him ; and, on Motion, the Creditors will be ordered to discharge the Bankrupt (*l*).

So, a Witness, who *voluntarily, and without a Summons*, is actually before the Judicature, tendering his Evidence, is entitled to the same protection (*m*) ; but a question might arise upon the effect of a want of Summons, where the arrest happens *condo* (*n*).

Petitioning Creditor's Debt.

A STRICT inquiry into the Petitioning Creditor's Debt is advisable, as it forms the foundation of the Commission (*o*).

By an Order of *Lord Rosslyn* (*p*), the Petitioning Creditor must be present at the Meeting, for the purpose of declaring the 623*] Party a Bankrupt, it being *extremely useful, in the commencement of the proceedings, to record evidence which will at all times be sufficient to support the Commission (*q*). If, however, the Petitioning Creditor is ill, and incapable of appearing except at the hazard of his Life, the Chancellor will, on an Affidavit of the circumstances by some medical Gentleman, order the Commissioners to admit proof of the Petitioner's Debt, by production of the Office Copy of the Affidavit upon which the Commission was grounded (*r*).

If there is not a *Debt in Law*, but only in *Equity*, though ever so strong, a Commission cannot be supported (*s*). An *Assignee of a Bond*, therefore, cannot petition for a Commission (*t*), he not being a legal Creditor (*u*) ; nor is a Debt, barred by the Statute of Limitations, sufficient to support a Commission (*x*).

It was formerly necessary, as before observed, that there should have been a good Petitioning Creditor's Debt subsisting anterior to the act of Bankruptcy ; but now, by a recent Statute (*y*), no Commission is avoidable by any act of Bankruptcy prior to the Debt of the Petitioning Creditor, of whom he had no Notice at the time of suing out the Commission.

624*] *If a Creditor has his *Debtor in Execution*, he cannot petition for a Commission of Bankruptcy (*z*). By the expired

(*l*) Ex parte King, 7 Ves. 312. See ex parte Kerry, 1 Atk. 54.

(*m*) Ex parte Bynes, 1 Ves. & Bea. 316.

(*n*) Ibid. 312.

(*o*) Ex parte Bowes, 4 Ves. 177.

(*p*) General Order, 26th November, 1798.

(*q*) Ex parte Foster, 17 Ves. 415.

(*r*) Ex parte Edwards, 8 Ves. 318.

(*s*) See ex parte Hillyard, 2 Ves. 407. Ex parte Williams, *ibid.* p. 252.

(*t*) *Medicot's Case*, 2 Str. 899.

(*u*) Ex parte Lee, 1 P. Wms. 782.

(*x*) Anon. Mosely, 37. Ex parte Dewdney, and ex parte Seaman, 15 Ves. 498. This point may now, perhaps be considered as settled ; but see Mr. Christian's remarks in his Bankrupt Law, 1st. vol. 221, &c. Lord Eldon, however, on reading those remarks, continued of the opinion he had expressed. Ex parte Roffey, 19 Ves. 468. See on the subject, *Hovendon v. Lord Annesley*, 2 Sch. & Lefr. 630, 631.

(*y*) 46 Geo. 3 c. 135 s. 5.

(*z*) *Cohen v. Cunningham*, 3 T. R.

Statute, 41 Geo. 3, c. 64 (a), he was enabled to obtain a Commission, and the Debtor became discharged of the Execution.

A Petitioning Creditor cannot proceed at Law, but is deemed to have made his election (b).

Though a Verdict for damages be obtained in an Action for a breach of Promise of Marriage, yet this alone, it seems, without a Judgment, before the date of the Commission, will not form a sufficient Petitioning Creditor's Debt (c).

Sugar sold, payable for, by the custom of trade, two Months after the Sale, does not create a Debt to support a Commission until the time of credit has elapsed (d).

An Attorney though he cannot bring an *Action* without delivering his Bill (see 2 Geo. 2, c. 23, s. 22), may take out a Commission of Bankruptcy; but the Bill must be afterwards examined (e).

The Petitioning Creditor must not be an *Infant*, for in such case he cannot enter into the Bond; nor will another Person be permitted to enter into the Bond for him, and a Commission obtained by him will be superseded (f).

*The Petitioning Creditor must prove his Debt, not [*625 merely on the opening of the Commission, but also a second time, at some Meeting for the proof of Debts, to entitle himself to the rights of a Creditor under the Commission (g).

The Statute 5th Geo. 2, c. 30, provides against Petitioning Creditors compromising Commissions of Bankruptcy; and it has been determined that the Creditor forfeits the *whole* of his Debt, whether the Composition made by him extends to the *whole* or a *part* only; and the forfeiture is not confined to the case of a Commission issued upon that particular act of Bankruptcy, but takes place equally upon any Commission that might be issued (h).

A Creditor who assents to, and acts under, an absolute Bill of Sale for the benefit of Creditors, but does not sign the Deed, cannot afterwards sue out a Commission against the Debtor, on the ground that the absolute Bill of Sale was an act of Bankruptcy (i).

With these few observations we shall close our remarks upon the Petitioning Creditor's Debt; and proceed to observe upon an act of Bankruptcy.

423; but see the forcible observations of Mr. Christian in his Bankrupt Law, 1 vol. 218.

(a) It is mistakenly considered as an existing Statute in 1 Cooke's Bankrupt Law, p. 28. edit. 6.

(b) Cooke's Bankrupt Law, 1 vol. p. 25, and Cases there cited, 6th edit.

(c) Ex parte Charles, 16 Ves. 256; and see S. C. 14 East, 197.

(d) Ex parte Roberts and Wells, 1 Madd. Rep. 72. S. C. Rose, 378.

(e) Ex parte Steele, 16 Ves. 166. Ex parte Sutton, 11 Ves. 163.

(f) Ex parte Barrow, 3 Ves. 554.

(g) See 2 Christian's Bankrupt Law, 423. List's Case, 2 Ves. & Bea. 374.

(h) Ex parte Vernon, 1 Cox, 61.

(i) Ex parte Shaw, 1 Madd. Rep. 598.

Act of Bankruptcy.

WHAT is, or is not, an act of Bankruptcy, is also a mere matter of Law, (*k*), the consideration of which, in detail, is not withheld [626*] in the Plan of this Work. In *an Action of Trespass against the Messenger of the Commission, the act of Bankruptcy may be tried (*l*). It may be tried, also, before the Chancellor, or the Vice-Chancellor, on a Petition to supersede the Commission (*m*); but if the Court has doubts, it directs an Issue to be tried at Law (*n*). On a doubtful point of Law which arose in Bankruptcy, Lord Hardwicke observed, "it is not proper for me to decide this question absolutely, *because it is a mere matter of Law (o)*": we shall, therefore, make only a few observations on this head.

If Commissioners find a Man a Bankrupt who is not so, an Action, it has been held, will lie against them (*p*).

Nothing is an act of Bankruptcy, (though the consequences may be precisely the same), except what is described in the Statutes (*q*).

If an act of Bankruptcy be committed, and afterwards, *on the same day*, a Commission issues, such Commission is valid (*r*); and a Commission may be supported if *sealed* after the act of Bankruptcy, though the Docket was struck before (*s*); but if the Petitioning Creditor did not believe an act of Bankruptcy was committed he would be guilty of perjury (*t*).

627*] *Though a Party concerting an act of Bankruptcy cannot maintain a Commission upon it (*u*), yet another Creditor, who was not privy to that transaction, may; and the Bankrupt, or any other Person concerned in it, cannot make the objection (*x*).

And though an act of Bankruptcy be concerted, yet if the Party can support the Commission by another act of Bankruptcy, he may (*y*), even though the latter act of Bankruptcy, occurred subsequent to the striking of the Docket (*z*); and the privy of the Bankrupt is no objection (*a*), though formerly it was.

A Commission may be sustained by an act of Bankruptcy

(*k*) 1 Atk. 199.

(*l*) See Parker v. Wells, 1 Bro. C. C. 178, in note.

(*m*) Ex parte Harrison, 1 Bro. C. C. 173. Ex parte Osborne, 2 Ves. & Bea. 177.

(*n*) See 1 Atk. 102.

(*o*) Ex parte Meymot, 1 Atk. 197.

(*p*) Witlocke's Case, Sel. Cas. in Ch. 46.

(*q*) Dutton v. Morrison, 17 Ves. 198.

(*r*) Wydown's Case, 14 Ves. p. 87. Ex parte Du Frene. 1 Ves. & Bea. 54.

(*s*) Wydown's Case, 14 Ves. 89. Ex parte Du Frene, 1 Ves. & Bea. 51.

(*t*) 1 Ves. & Bea. 56.

(*u*) Ex parte Gardener, 11 Ves. & Bea. 48.

(*x*) Ex parte Bourne, 16 Ves. 146.

(*y*) Ibid. 148. Ex parte Du Frene, 1 Ves. & Bea. 52.

(*z*) Ex parte Du Frene, 1 Ves. & Bea. 50.

(*a*) Ex parte Edmonson, 7 Ves. 303.

committed after retiring from Trade, the Debts contracted in the course of that Trade remaining unpaid (b).

Provisional Assignment.

THE Crown is not bound by the Statutes in Bankruptcy (c) ; and therefore an *Extent*, in respect of a Debt that is due (d), served upon the Property of the Bankrupt, will bind from the *Teste* of the Writ, unless there has been an Assignment by the Commissioners (e) ; this, among other things, gave rise to what are termed *provisional Assignments* (f).

*It seems a hardship upon Creditors, that a Debt to the [*628 Crown may sue out an *Extent* in Aid against the Bankrupt before the Assignment of his Estate to an Assignee, and may recover the whole of his Debt due to him from the Bankrupt, and that the Assignees afterwards can have no remedy, though the Debtor to the Crown is sufficiently able to pay his Debt without the Bankrupt's Property (g).

A provisional *Bargain and Sale* is as necessary, in respect to the *real Estate* of a Bankrupt, as a provisional Assignment is in regard to *personal Property*, in order to prevent the effect of an *Extent* (h).

Where a Bankrupt is entitled to *Copyhold* Property, it is not usual (in pursuance of a suggestion by Lord Hardwicke (i),) to include it in a provisional Assignment ; but, to save a second Fine, the Commissioners convey to a Purchaser in the first instance (k) ; nor can any inconvenience result as *Copyholds* are not liable to be taken in *Execution*, or upon an *Extent* (l).

(b) Ex parte Bamford, 15 Ves. 458 ; and see ib. p. 493.

(c) Ex parte Russel, 1 Rose, 278. Ex parte Temple, 2 Ves. & Bea. 394. Ex parte Dick, 2 Black. 1142.

(d) A Debt *not due* will not ground an extent. Attorney-General v. Bebb, 1 Rose, 19, and Case cited in note.

(e) See 1 Cook's Bankrupt Laws, 384, last edition ; and see ex parte Smith, 5 Ves. 297.

(f) In Brasse v. Dawson, 1733. MS. Mr. Justice Page thought these Provisional Assignments might be defeated by *ante dating* the extent. See *quæ*.

(g) See Phillips v. Shaw, 8 Ves. 244, and cit in 2 Christian's Bank. Law, 181.

(h) See 2 Christian's Bankrupt Law, 180, where the learned author observes, a provisional bargain and sale has never yet been mentioned in any Treatise upon the Bankrupt Law.

(i) Drury v. Man, 1 Atk. 96.

(k) Charman v. Charman, 14 Ves. 583, in note 2.

(l) 1 Atk. 96. It is usual not to include Copyholds in provisional Assignments, they not being liable to an Extent ; nor in general Assignments to the Assignees, a Fine to the Lord being thereby saved, the Commissioners conveying in the first instance, to a purchaser : this practice, however has been objected to. It is right not to include Copyholds in a provisional Assignment, and this seems what was exclusively recommended in Drury v. Man, 1 Atk. 96, where Lord Hardwicke uses the words *temporary assignment* ; but by the 13 Eliz. c. 7. s. 2, it seems imperative on the Commissioners to assign to the Assignees *all* the Estate and Effects of the Bankrupt. See Christian's Bankrupt Law, 1 vol. 256 ; and therefore an Assignment to the Assignees, without including Copyholds, seems unwarranted.

*In one Case a Debt to the Crown was preferred to Creditors under a Bankruptcy, the Sheriff being in Possession under several Extents ; the *teste* of one of which, for part of the Debt, was on the day the provisional Assignment was made, and the others issued *subsequently* (m).

There are no decided Cases showing what is the authority of a provisional Assignee over the Bankrupt's Property ; but it seems, that whilst he continues such he has all the authority of Assignees (n).

If a Messenger under a Commission of Bankruptcy is put out of Possession of the Property, it is a Contempt (o), and the Parties will be ordered to give Security for answering the Bankrupt's Interest (p) ; and if a Bond of Indemnity be given to secure Persons from the consequence of doing an act amounting to a Contempt, the Person giving such Bond is himself guilty of a Contempt (q).

Where the Messenger has a Warrant to enter a House, and seize the Effects of the Bankrupt, he is authorized to seize the Bankrupt's Property, but not that of any other Person ; but though he should do so, he cannot, *brevi manu*, be turned out ; and contemptuous language used, or force opposed to him, is a Contempt of the Great Seal. The Party must take his remedy at Law (r).

-630*] **Effect of the Commission upon the Property of the Bankrupt.*

THE Question, what Property passes under a Commission of Bankruptcy, is, in general, a question of Law ; we shall therefore only make a few Observations on the subject.

By the Statute of the 13th Eliz. c. 7, s. 2, the Conveyance by the Commissioners of the Bankrupt's Property to the Assignees, passed all the real and personal Estate of the Bankrupt, from the time of the act of Bankruptcy, but by the 1st Jac. I. c. 15, s. 14, it was provided ; that no Debtor *bona fide* paying Money to the Bankrupt, without Notice that he is a Bankrupt, or, according to the interpretation of the Act, without Notice of an act of Bankruptcy, should be liable to repay the same. And by the 1st Jac. I. c. 19, s. 14, the operation of the act of Bankruptcy was further limited, and it was provided, that if an act of Bankruptcy was committed, and afterwards a Sale by the Bankrupt, and a Commission issued, and *five* years had elapsed between the Bankruptcy, or, as it was understood, between the act of Bankruptcy and the date of the Commission, the intermediate Sale should be effectual. The relation the Assignment had, not

(m) *Rogers v. Mackenzie*, 4 Ves. 782 ; and see *Parker's Rep.* 126.

(n) See 2d vol. *Christn. Bank. Law*, 180.

(o) *Ex parte Page*, 17 Ves. 60.

(p) *Ex parte Dixon*, 8 Ves. 104.

(q) *Ib. ex parte King*, 7 Ves. 316.

(r) *Ex parte Page*, 17 Ves. 60.

only over-reached acts done in *pais*, but also acts on *Record*, and legal acts done by him, such as Judgments; so that if Execution was taken out after the act committed, *upon a [*631 Judgment before, such Execution was set aside (s).

This operated very harshly and inequitably; and long ago, *Sir Joseph Child* complained of it (t). And by a recent Statute (u), it is enacted, that all Conveyances by, and all Transactions with, any Bankrupt, *bona fide*, more than two calendar Months before the Date of his Commission, shall be valid, notwithstanding any prior act of Bankruptcy, provided the Party dealing with the Bankrupt had not Notice of it at the time, or that he was Insolvent, or had stopped Payment.

If, after the Assignment of the real Estate by the Commissioners to the Assignees, and before the Bankrupt has obtained his Certificate, any *real Estate* hath devolved upon him, there must be a new Bargain and Sale (x); but no new Assignment is necessary of *personal Property* acquired within such period (y).

The Law seems to be that (with the exceptions before alluded to) the Commission has relation to the act of Bankruptcy; and all the Bankrupt's Property, real and personal, present or future, vests by relation from that time (z), insomuch, that if a Commission issue, and an Execution be issued against the Bankrupt's Effects, though only two or three hours subsequent to *the act of Bankruptcy, a fraction of a day, it cannot be [*632 supported (a).

Estates in *Scotland* (b), in *Ireland* (c), or in the *Plantations*, belonging to the Bankrupt, pass under his Commission (e). So totally does the Bankruptcy divest the Bankrupt of all his In-

(s) See *Billon v. Hyde*, 1 Ves. 328. S. C. 1 Atk. 127.

(t) *Child on Trade*, p. 71.

(u) 46 Geo. 3. c. 135.

(x) *Ex parte Pondfoot*, 1 Atk. 253. *Moth v. Frome*, Amb. 394. *Carleton v. Leighton*, 3 Meriv. 667.

(y) *Kitchin v. Bartah*, 7 East, 53.

(z) *Barker v. Goodair*, 11 Ves. 83.

(a) See *Spencer's Case*, mentioned in note to *Franklin v. Lord Brownlow*, 14 Ves. 554, in note, and see *ex parte D'Obrée*, &c. 8 Ves. 32, and *Barker v. Goodair*, 11 Ves. 84.

(b) *Ex parte Cridland*, 3 Ves. & Bea. 100. In *Skelkrig v. Davis*, 2 Rose, p. 312, Lord Eldon says, "I have heard it repeatedly stated in the Court in which I have the honour to administer the Bankrupt Laws, that was usual for Creditors not to proceed against a Real Estate in Scotland, according to the forms of the law of that country, but for the

Bankrupt to convey his Real Estate there to his English Assignees, in order that it may be converted into money, for the benefit of all the Creditors. It has very frequently happened, when a man becomes Bankrupt, and is known to possess a Real Estate in Scotland, that his Creditors say to him, 'We will not talk to you on this subject of legal obligation; the moral obligation on you is clear, and we have the disposing of your Estate; if you will not convey your Real Estate you shall remain uncertificated.' Under the effect of that control, the Real Estate is very frequently brought into the common fund. But I know no process in the Law of England that can compulsorily effect it."

(c) *Neave v. Nottingham*, H. Black. 132.

(e) *Benfield v. Solomans*, 9 Ves. 77.

terest, that if he files a Bill in respect of Property, a *Demurrer* will lie (*d*); unless where he charges collusion by and between the Assignees and the Debtors, and avers that there will be a Surplus, and charges a direct application to the Assignees to sue (*f*); or unless it be a Bill of Discovery by the Bankrupt against a Creditor suing him at Law (*g*).

It is important, however, to observe, that the Assignees take, 633*] subject to all the *Equities* (*h*), and *equitable Liens (*i*), under which the Bankrupt held his property.

Debts in *America* pass by the Assignment under the Commission; but it seems the American Government will not take Notice of the Rights of the Assignees under the Bankrupt Laws in this Country; nor has the Chancellor any authority to compel a Bankrupt to execute to them an Assignment of Debts due to him in *America* (*k*).

It is often laid down in the Books as a general Rule, that Assignees stand in the place of the Bankrupt; but this Rule does not hold good in every case (*l*), for Assignees have all the Equity the Creditors have, and may impeach transactions, which the Bankrupt could not (*m*); for instance where there is a *voluntary Conveyance* by a Bankrupt, the Court, it hath been said, may carry it into execution against the Bankrupt himself (*n*), but not against his Assignees (*o*).

Upon the construction of the 21st Jac. l. c. 19, s. 10 and 11, it has been held, that wherever, by the consent and permission of the true Owner of Goods, a Trader in Possession has the apparent Ownership, and incidental to that, the order and disposition of them, and no other circumstance appears to control such apparent Ownership, and show that the Trader was not the real Owner, the true Owner permitting the Trader to exhibit this 634*] appearance, does it at his *peril (*p*); and though Goods belonging to the Bankrupt have been mortgaged, yet if the Bankrupt has been permitted to continue in the Possession, Order and Disposition of them, they will, in virtue of the Act (*q*), be considered as his, and pass to the Assignees (*r*); but this doctrine applies only where there is the consent of the Owner to leave the Goods in the power of the Bankrupt (Possession only not

(*d*) Benfield v. Solomons, 9 Ves. 80.
86.

(*f*) Ibid. 77.

(*g*) Lowndes v. Taylor, 1 Madd. Rep. 423, afterwards confirmed on Appeal.

(*h*) Mitford v. Mitford, 9 Ves. 87. Ex parte Herbert, 13 Ves. 189. Grant v. Milles, 2 Ves. & Bea. 309.

(*i*) Brown v. Heathcote, 1 Atk. 162.

(*k*) Ex parte Blakes, 1 Cox, 398.

(*l*) Tyrrel v. Hope, 2 Atk. 562.

(*m*) Anderson v. Maltby, 2 Ves. jun. 255, S. C. 4 Bro. C. C. 244.

(*n*) Sed vid. ante, 1 vol. p. 413, &c.

(*o*) Tyrrel v. Hope, 2 Atk. 562.

(*p*) See Horn v. Baker, 9 East, 251, and the previous cases referred to in that case.

(*q*) Ryall v. Rowles, 1 Ves. 349. S. C. 1 Atk. 164, and 1 Serj. Wilson's Rep. 280. See what is said as to Mr. J. Burnett's judgment in this case, 1 vol. p. 256, note c.

(*r*) Bourne v. Dodson, 1 Atk. 156.

being sufficient) or laches in him, by letting them remain there so as to gain him a false Credit (s). If, for instance, there be a Mortgage, or a Sale of Goods, and the Vendor does not deliver them at the time appointed, but on Trover against him keeps the Vendee at arm's length, and in the mean time becomes Bankrupt, this would not be considered as leaving the Goods by the Vendee in the Possession of the Bankrupt within the Act (t). —The words in the Act (u), "in his Order and Disposition with the consent of the true Owner," means, where the Possession, Order and Disposition, is in a Person who is not the Owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits, unconscionably, as the Act supposes, to have such Order and Disposition. The object was, to prevent deceit by a Trader, from the visible Possession of a Property to which he was not entitled. But in the *construction of the Act, the nature of the [*635 Possession has always been considered; and the words have been construed to mean Possession of the Goods of another, with the consent of the true owner (x). The Exceptions to the Rule are in the Cases of Factors, Bankers, Lodgers, and others, who are known to have the Goods of other Persons in their Possession (y).

Debts and Chattels of the Bankrupt, if they remain in the Possession, Order, and Disposition of the Bankrupt, at the time of the Bankruptcy, will pass by the Assignment to the Assignees. In order to divest the Bankrupt of Debts, he must have done every thing that is equivalent to a delivery of Chattels personal; that is of moveable Goods. That which is equivalent to delivery of moveables is in the Case of Debt, an *Assignment and Delivery of the Security*, if any, and *Notice to the Debtor of the Assignment* (z).

The Assignment of a Mortgage Debt is good, without Notice to the Mortgagor (a).

An Assignment of a Ship at Sea, for a valuable Consideration is good against the Assignees of a Bankrupt, though no Possession is taken thereof (b).

Lands held by the Bankrupt in Fee, in Fee-Tail, for Life, or for Years, Rents, Annuities, Reversions, and Remainders, and any future or contingent Interest in Land; and Lands, or any other Interest to which he is entitled, *jure marito*, pass under the Assignment, subject to the Equities affecting it; and

(s) West and Skip, 1 Ves. 243, and see *Flyn v. Matthews*, 1 Atk. 185.

(t) See West and Skip, 1 Ves. 244, where this and other cases of the kind are put by Lord Hardwicke.

(u) 11 and 12 Geo. 3. c. 8 s. 9.

(x) 1 Rob. & Leifr. 337.

(y) Horn v. Baker, 9 East, 245.

(z) Jones v. Gibbons, 9 Ves. 410.

(a) Jones v. Gibbons, 9 Ves. 411.

See ante, 1 vol. 547.

(b) *Bourne v. Dodson*, 1 Atk. 154.

Brown v. Heathcote, ib. p. 100.

636*] *Lands which the Bankrupt has purchased jointly with his Wife, Children, or Child, for his own use, or for such use or interest as he might part with.

Where, therefore, a Trader, who afterwards became a Bankrupt, purchased in the joint names of *Himself and his Wife*, it was held void as against the Creditors (c).

And where a Trader advanced half the Money for the renewal of a Lease to another, and the Lessee gave a Note to repay the Money, unless he should by Will, give the Estate to one of his Children, and she bequeathed the Estate to his Daughter, and the Father became a Bankrupt, a Moiety of the Estate was held to be vested in the Assignee, under the 1st Jac. 1. c. 15, s. 5 (d).

So, where a Tenant for Life, with Remainder to his Children, redeemed the Land-Tax on the estate with his own Money, introducing into the Contract for the Redemption, his own Name, and that of another, as Trustees for his Children, and afterwards becomes Bankrupt, the benefit of the Purchase was held to belong to his Assignees; and on a Bill filed by them against a Purchaser of his Life Interest, and of the Land-Tax so redeemed, a specific Performance was decreed, as being within the Statute 1 Jac. 1. c. 15, s. 5 (e).

The Creditors are entitled to the Husband's Interest in his Wife's *Choses in Action* (f).

If there be a debt due to the Wife *Dum sola*, or which belongs to her 637*] comes due to her during the Coverture, and *which would survive to her in case her Husband died before he had reduced it into Possession, and he becomes Bankrupt, and dies after an Assignment under the Bankrupt Laws, but before the Assignees have gained Possession of the Property, the Right of Survivorship, it seems, remains in the Wife (g).

Lands held by the Bankrupt in Joint-tenancy pass. Copyholds also pass (h), as likewise do contingent Interests or Possibilities (i), if they are such as can be assigned or released, and disclosed upon the last Examination (k): an Estate, therefore, acquired by descent, after a Certificate obtained, is not assignable by the Commissioners (l).

The deed of Assignment by the Commissioners, has, when enrolled (m), all the operation over an Estate-Tail in a Bankrupt, as a Recovery suffered by the Bankrupt before his Bankruptcy,

(c) *Glaister v. Hewer*, 8 Ves. 195.
9 Ves. 12. 11 Ves. 377.

(d) *Fryer v. Flood*, 1 Bro. C. C. 160.

(e) *Emly and others, v. Guy*, 3 Meriv. 702.

(f) *Fitzer v. Fitzer*, 2 Atk. 514.

(g) *Mitford v. Mitford*, 9 Ves. 87.
See some observations of Mr. Christian, in his Bankrupt Laws, 1 vol. p. 265, et seq. upon this case.

(h) See what is said ante, p. 628.

(i) *Higden v. Williamson*, 3 P. Wms. 131, and see *Worrall v. Marler*, in note to 1 P. Wms. 459. *Study v. Tingcombe*, 5 Ves. 695.

(k) *Moth v. Frome*, Amb. 394.

(l) *Ib. Sed qu.* whether an hope of succession is not assignable. See ante 1 vol. p. 549.

(m) See 21 Jac. 1. c. 19. s. 12.

would have had, and in some cases a more extended operation; for where a Tenant in Tail mortgaged for years, and afterwards became a Bankrupt, and then died without suffering a Recovery, it was held that the Assignees of the Bankrupt should have the Estate, clear of the Mortgage (n); for it conveys a Fee, clear of Mortgages and Encumbrances from the time of his death; *but if the Bankrupt on a Mort. [*638 gage covenants for further assurance, he would in Equity be compelled to suffer a Recovery, and the Assignees are bound by such covenant, and must in such case redeem the Mortgage (o).

Where the Patron of a Living becomes a Bankrupt, the Advowson may be sold; but if the Church be void at the time of the Sale, the Bankrupt must present, the void Turn not being saleable (p).

If a Bankrupt be seised for Life, with a general power of Appointment, with Remainder, in default of Appointment, to the Heirs of his Body, it has not been determined what is the effect of Bankruptcy upon the power (q); nor what would be the case between the Creditors under the Bankruptcy, and any Appointee under the power, if the Bankrupt attempted to execute it; nor whether, being a power of a general nature, having no specific objects, it is a power under which the Bankrupt has an interest that would pass by the Bankrupt Laws to his Assignees; but it has been held, that the Bankrupt cannot be compelled in Equity to execute a power for the benefit of his Creditors (r).

The Assignees are entitled to the benefit of an Equity of Redemption, but not, it seems, of a Covenant for the Renewal of a Lease (s).

*Though in a Lease there be a Covenant not to assign [*639 without License, yet Bankruptcy supersedes such a Covenant, and the Property passes under the Commission, and may be assigned without License (t).

A voluntary Settlement after Marriage is by the Statute (u) void, as against Creditors under a Commission.

All Property acquired by the Bankrupt before he obtains his Certificate, belongs to his Creditors. Even where a Legacy was left to a Bankrupt, and the Testator died pending an un-

(n) Beck v. Welch, 1 Serj. Wils. 276; but see the forcible observations of Mr. Powell on this decision, Pow. Morg. 253.

(o) Pye v. Daubau, 3 Bro. C. C. 696. Edwards v. Applebee, 2 Bro. C. C. 652. Mitford, v. Mitford, 9 Ves. 100.

(p) Cooke's Bankrupt Law, 1 Vol. p. 304, edit. 6 Christian's Bankrupt Law, 1 Vol p. 262.

(q) Thorpe v. Goodall, 17 Ves.

388; but see Lord Townsend v. Wyndham, 2 Ves 462.

(r) Thorpe v. Goodall, 17 Ves. 388, 460. S. P. 1 Rose, 40.

(s) Vandeancker v. Desborough, 2 Vern. 96; Drake v. Mayor of Exeter, 1 Ch. Cas. 71; but in S. C. 2 Freem. it is said the Lessor was decreed to renew.

(t) Weatherall v. Geering, 12 Ves. 512.

(u) Jac. 1. c. 15. s. 5. Walker v. Burroughs, 1 Atk. 93.

founded Petition to stay his Certificate, it was held to belong to his Assignees, unless it could be shown that the Petition was resorted to for the purpose of disappointing the Bankrupt's claims to the Legacy (x). If a Bankrupt before his Certificate again enters into trade, a second Commission, whether joint or several, cannot be issued against him, for he cannot, unless there are very special circumstances, have any Property whatever (y); but where an uncertificated Bankrupt trades *with the knowledge of his Creditors*, the Creditors under the Commission will, it seems, lose their priority (z).

As an uncertificated Bankrupt can acquire Property only for the Creditors, so if he enters into trade in Partnership, the Creditors of that Partnership have no Equity against the Assignees for an application of the Property used and acquired in that Partnership, *to the payment of their Debts (a); unless the Assignees have by their conduct excluded themselves from claiming such property (b).

If an Estate comes to a Bankrupt before he has obtained his Certificate, a Conveyance of it, it seems, may be made by the Commissioners to the Assignees in the usual manner, though the Bankrupt has obtained his Certificate before such Conveyance is made; though there is no decision on the subject (c); but if after the Certificate is allowed, there is an accession of Property, the Bankrupt takes it (d).

The Bankruptcy of one Partner dissolves the Partnership. The Assignees are entitled not only to an account and distribution of the Stock, &c. but also to a participation of subsequent Profits, made by the other Partners carrying on the trade with the capital existing at the time of the Bankruptcy (e): whether they are entitled to Profits produced by a joint application of such Capital, and *other Funds*, has not yet been decided (f).

Offices, which do not concern the administration of Justice (g), have been held liable to the Bankrupt's Debts; the office, for instance, of taking care of the Palace, and the House of Lords, granted to one, his Executors and Administrators, for 641*] thirty-one *years (a). So, the Office of *Under Marshal* may be sold (b), but not the place of a *Jew Broker* (c). *Lord Hardwicke* thought that if an Officer in the Army became Bankrupt, he had power to appropriate his pay, for the benefit of his Creditors (d); but this Doctrine has been overruled (e).

(x) *Ex parte Ansell*, 19 Ves. 208.

(y) *Ex parte Martin*, 15 Ves. 114.

(z) *Troughton v. Gitley*, Ambl. 630; and see *ex parte Storks*, 3 Ves. & Bea. 105.

(a) *Everett v. Backhouse*, 10 Ves. 94; and see *ex parte Martin*, 15 Ves. 114.

(b) As in *Troughton v. Gitley*, Ambl. 630.

(c) See 1 *Christian's Bankrupt Law*, p. 168.

(d) *Jacobson v. Williams*, 1 P. Wms. 386; and see *Meth v. Frome*, Ambl. 394, ante p. 367.

(e) *Crawshay v. Collins*, 15 Ves. 218; see also *Featherstonehaugh v. Fenwick*, 17 Ves. 309.

Property possessed by a Bankrupt *in autre droit* (f), as Factor, Executor, or Trustee, for instance, does not pass under the Commission. As goods consigned to a *Factor* remaining in *specie*, and found in his hands at the time of the Bankruptcy, do not pass under the Commission, so where goods consigned are sold, and the Factor takes *Notes* instead of Money, they do not pass (g).

Where an Executor becomes a Bankrupt the Commissioners cannot seize the specific effects of his Testator, not even in Money, which cannot be specifically distinguished and ascertained to belong to such Testator, and not to the Bankrupt (h); and where Assignees possess themselves of effects which belong to the Bankrupt as Executors only, the Court, on a Bill filed (i), will to secure such Effects, appoint a Receiver, to whom the Assignees shall account for *so much [*642 as they have got in of the Testator's Estate (k). Where a Bankrupt is an Executor and *residuary Legatee*, and has paid the Debts and particular Legacies out of part of the Assets, if he refuses to collect in the rest, notwithstanding the Assignees have not the legal interest vested in them, the Court would assist them to get in the remainder in the name of the Executor (l).

By the 36 Geo. 3. c. 90, where a Trustee of Stock becomes a Bankrupt, the Courts of Chancery or Exchequer, in any Cause depending therein, may order the same to be transferred, together with the Dividends, into the name of the Accountant General of the Court of Chancery, or the Deputy Remembrancer of the Exchequer, in Trust, in such cause, or otherwise to and into the name or names of the person or persons equitably or beneficially entitled to the same.

Where a person about to commit an act of Bankruptcy *voluntarily*, and *without any pressure*, delivers over Effects to a particular Creditor, this is a void transaction. It is otherwise where the Debtor is *pressed* by the Creditor for his demand, and the Debtor gives him a security, a Mortgage for instance; it cannot be defeated (m).

(f) 15 Ves. 218.

(g) As to which, see 5 and 6 Edw. 6 c. 16, and 49 Geo. 3. c. 126.

(a) Schellinger v. Blackerby, 1 Ves. 347.

(b) Ex parte Butler, 1 Atk. 210, 215. S. C. Ambl. 73.

(c) Ambl. 89, ex parte Lyons.

(d) Ex parte Butler, 1 Atk. 214.

(e) Flarty v. Odium, 3 Durn. & East, 681. Lidderdale v. Duke of Montrose, 4 Durn. & East, 248, and see Stone v. Lidderdale, 2 Anat. p. 539.

(f) Caffrey v. Darby, 6 Ves. 496. Copeman v. Gallant, 1 P. Wms. 314. ex parte Marsh, 1 Atk. 159; and see 1 Cook's Bankrupt Law, 391, 6th edit. and the cases there cited.

(g) Ex parte Dumas, 1 Atk. 234. S. C. 2 Ves. 585.

(h) Howard v. Jennet, 3 Burr. 1369.

(i) Ex parte Tupper, 1 Rose, 179.

(k) Ex parte Ellis and others, 1 Atk. 101.

(l) Ex parte Butler, 1 Atk. 213.

(m) Ex parte Scudamore, 3 Ves. 88.

Certificates of the East India Company, on payment into their Treasury in India, and a Navy Bill remitted, indorsed by the Testator to his Agent in England, being at the time a Cred-643*] itor, were, after *the Bankruptcy of the Agent, and deaths of the Testator and Bankrupt, held not to pass to the Assignees, no Evidence of appropriation being produced.

So, it seems if Bills be remitted to a Bankrupt for a *special purpose*, as to pay Acceptances, such Bills do not belong to his Assignees (n).

A *Compensation* under the London Docks Act to the Proprietors of ancient privileged Quays, was held to pass under a Commission of Bankruptcy (o).

If the Bankrupt before his Bankruptcy deliver a promissory Note to a Creditor, payable to the Bankrupt or order, but without Indorsement, he may after his Bankruptcy indorse the Bill, and if he refuses, on a Petition against the Bankrupt and the Assignees, praying for an Order for the Indorsement, an Order for that purpose will be made, and with Costs (p).

By the 49 Geo. 3, c. 121. s. 19, it is provided that where the Assignees accept a Lease made to the Bankrupt, he shall not be liable for Rent accrued due after such acceptance, or for any breach of Covenants; and if the Assignees, on application to them, decline to determine whether they will or not accept the Lease, the Lessor, his Heirs, Executors, Administrators or Assigns, may apply to the Person or Persons holding the Great Seal, praying that the Assignees may either accept the Lease, or deliver up the same, or an Agreement for a Lease, and the Possession of the Premises demised or intended to be demised, 644*] who shall thereupon make such Order as in all the *circumstances of the case shall seem meet and just, and which shall be binding on all Parties. It is apparent that if the Assignees *accept* the Lease, or *decline* it, the Court has no jurisdiction under this Section of the Act; and that it is only where Assignees *will not decide* on the subject that a jurisdiction is given.

The Act does not provide for the case where there has been a Deposit of a Lease by way of equitable Mortgage, and which cannot, therefore, be delivered up by the Assignees; but where that was the case, and the Assignees had determined whether they would or not accept the Lease, the Assignees were directed to deliver up the Possession of the House or Lease to the Petitioner, and execute an Assignment or Surrender to the Petitioner, of the Bankrupt's interest in the Lease (l).

Before we conclude this Head it is proper to observe, that

(n) *Hassall v. Smithers*, 12 Ves. 121.

(o) *Chandler v. Gardiner*, quot. 17 Ves. 338, 343.

(p) *Ex parte Greening*, 13 Ves. 206.

(l) *Ex parte Clunes*, 1 Madd. Rep. 78.

it has been ruled over and over again, that the Bankrupt cannot be called upon to join in a Conveyance to a Purchaser of his Estate under the Commission (*m*).

Proof of Debts.

If a Person *claims* (the word used in the Statute, but which, probably, means *proves*) a Debt not due, he forfeits double the amount, and is liable to a Prosecution for Perjury (*n*).

Debts may be proved at any of the public Meetings *ap, [645 pointed by the Commissioners (*o*). If a Creditor is resident in *Foreign parts* (*Scotland*, for this purpose, is considered as included in the term), he may, under the 5 Geo. 4, c. 30, s. 26 prove his Debt by Affidavit before a Magistrate of the *Country* (*p*). *Corporations* may prove Debts by the Affidavit of a Person authorized by a general Power of Attorney (*q*). If the Creditor lives above twenty miles from the place where the Commission is executed, his Deposition is admitted. Any Creditor may, at his own expense, have a Meeting for the purpose of proving his Debt; but it ought to be advertised in the Gazette, that other Creditors may attend if they think proper, to oppose the proof: and it seems the practice to admit the proof of any other Debt at such Meeting, if the Creditor will contribute his proportion to the expense of the Day, and the Assignees admit the fairness of such Debt (*r*).

Formerly the Rule was, that no Debt could be proved which did not exist at the time of the act of Bankruptcy upon which the Commission was founded (*s*); but now, by 46 Geo. 3, c. 125, s. 2, Debts *bona fide* contracted *before the date of the Commission* may be proved, provided the Creditor had no notice of a prior act of Bankruptcy; and the Bankrupt is discharged by his Certificate from all such Debts.

If, however, a Verdict be obtained in an Action for Mesne Profits, and a Judgment is obtained after the *Bankrupt- [646 cy, this is not within the Statute (*t*); and where the Costs of a Chancery Suit were directed to be paid by an Award made before the Bankruptcy of the Defendant, but the Costs were not taxed until after he became Bankrupt, it was held they could not be proved under the Commission, but that the Bankrupt remained liable to be attached for the amount under the Award made a Rule of Court (*u*). Nothing is more clear than that *unliquidated Damages* cannot be proved (*x*).

(*m*) *Selkrig v. Davis*, 2 Rose, 312.

(*n*) 1 Jac. 1, c. 15, s. 11.

(*o*) 1 Christian's Bankrupt Law, 249.

(*p*) *Ex parte Macdougall*, 2 Cox,

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(*q*) *Ex parte Bank of England*, 1 Swanst. 10.

(*r*) 1 Christian's Bankrupt Law, 249.

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(*s*) See *O'Brien v. Grierson*, 2 Ball and Bea. 335.

(*t*) *Moggridge v. Davis*, 1 Wightwick, 16.

(*u*) *King v. Davis*, 9 East, 318.

(*x*) *Ex parte Hunter*, 6 Ves. 97. *Utterson v. Vernon*, 3 T. R. 539. 4 T. R. 571.

The common Proof before the Commissioners is the Oath of the Creditor, which is binding, unless the Commissioners, the Bankrupt, or the other Creditors object to the Debt, and then it is examined, and an Appeal lies, by Petition, from the determination of the Commissioners, to the great Seal (a); though, at first, it was doubted whether the Chancellor had jurisdiction to interfere on such Appeal (b). If no objection is made in a reasonable time, such proof by Oath is conclusive; if reasonably objected to, it is admitted only as a *Claim*.

Claims also, are admitted, where Accounts are not completely balanced, so as to enable the Creditor to swear to the exact Sum; and in many other Cases, where further steps are required before the Demand can be fully substantiated; and a Dividend is reserved upon them in the hands of the Assignees; but if such claims are not made good before a second or final *Dividend, the Commissioners may strike them out (c), unless good reason be given for their continuance; and where a Claim is substantiated after the Dividend made, and no reservation of a Dividend upon the Claim, the Creditor is only entitled to his share of the future Dividends; but where there has not been gross neglect, the Chancellor will order that such Creditors shall be paid out of the Money in the Assignees hands, before another Dividend is made, what would have been payable to him if he had proved before the previous Dividends were made (d).

By the 49 Geo. 4, c. 121, s. 14, proving or claiming a Debt under a Commission operates as a relinquishment of any Action or Suit against the Bankrupt in respect of such Debt, but the Creditor is not liable for Costs; nor does it operate as a relinquishment of an Action or Suit against other Persons jointly sued with the Bankrupt.

A Creditor cannot present a Petition to prove his Debt unless he has been before the Commissioners; and his Petition must state what passed before the Commissioners (e).

Proof by one Captor on behalf of himself and other Captors, has, on Petition, been allowed; the Party proving to take his own Dividend, and the Dividends of the other Captors to be paid into the hands of the Accountant General (f).

648*] When a Creditor applies to approve a Debt he must swear as to whether he has a Security or not; and if he has, and insists upon proving, he must deliver it for the benefit of the Creditors, unless it be a joint and several Security from the

(a) See *Bromley v. Goodere*, 1 Atk. 77. *Clarke v. Capron*, 2 Ves. jun. 666. but see 1 Cooke's Bank. Law, 271. edit.

(b) 1 Ch. Cas. 275; see ante p. 483, and the forcible observations on this subject by Mr. Christian, there referred to. (d) 1 Cooke's Bankrupt Law, p. 271, edit. 6. and see 1 Sch. & Lefr. 242.

(e) Ex parte Wright, 2 Ves. jun. 42.

(c) 1 Christian's Bank. Law. 325; (f) Anon. MS.

Bankrupt and another Person, in which case he may prove his Debt without delivering up the joint Security; he being entitled to recover what he can from the Co-security, and take his Dividend upon the whole of his demand, provided he does not receive more than twenty Shillings in the Pound in the whole (g). So, where a Bankrupt, previous to his Commission, procured Persons to assign an Interest in Copyhold Premises as a Security to a Creditor of the Bankrupt, it was held, the Creditor might prove without delivering up such Security (h).

A joint Creditor cannot prove under a separate Commission for the purpose of receiving a Dividend, except where he is a petitioning Creditor.

Whether a Debt can be proved or not may be discussed in the matter of the Bankrupt; and it is only where Property is sought to be divested that a Bill is necessary (i).

There is no Jurisdiction in Bankruptcy over a Creditor who does not come in under a Commission; but if a Creditor applies to prove a Debt, he must, in general, answer questions put to him. Even a Purchaser for a valuable consideration, without Notice, may be compelled to disclose the infirmity of his Title (k). The Creditor may be examined as to the *usurious* transactions; and in Bankruptcy, if a Deed *is usurious, [*649 a Party whose Debt is so tainted is not, as in proceedings in Equity, allowed what was actually advanced (l).

An Order for an Inquiry before Commissioners, or an Issue, where a Creditor has proved a Debt, to try whether the Debt was usurious, will not be granted merely on a disposition of the Bankrupt as to the usury (m).

A Charge, by a Bill-Broker in the Country, of ten Shillings per Cent. Commission, in respect of a Bill payable in London, is not usurious (o). And if usurious Interest is not contracted for, the Security is not invalidated by subsequently taking such Interest (p).

No Person is compellable to answer questions which have a tendency to criminate him; but if a Creditor refuses to answer he is not permitted to prove (q). If a Person has received Money of the Bankrupt, and he refuses to say how he has applied it, it is considered as if the Money was unapplied in his hands (r).

The Commissioners are determined, at the hazard of an Ac-

(g) 1 Cooke's Bank. Law, p. 138, 139, edit. 6.

(h) Ex parte Goodman, 3 Madd. Rep. 373.

(i) Assignees of Gardiner v. Shannon, 21 Sch. & Lefr. 228.

(k) Ex parte Herbert, 13 Ves. 187.

(l) Benfield v. Solomons, 9 Ves. 85. Ex parte Skip, 2 Ves. 489. Ex parte Scrivener, 3 Ves. & Bea. 14. 16.

(m) Ex parte Burt, 1 Madd. Rep. 46.

(o) Ex parte Henson, 1 Madd. Rep. 112.

(p) Ex parte Jennings, 1 Madd. Rep. 331.

(q) Ex parte Symes, 11 Ves. 521, S. C. MS.

(r) Ibid.

tion, whether the questions are such as the Person is bound to answer; and the Chancellor will not interfere with their discretion on the subject, by an Order upon them to enforce answers from a Person examined as to the Bankrupt's Property received by him (s).

650*] It hath been held, that if after a Docket struck, *the Creditor takes a Security or Satisfaction, the effect of that transaction under the Statute (t), though no Commission issued, was not only a Forfeiture of what was so received, and an act of Bankruptcy, but that the Debt was destroyed (u); in a subsequent Case, however, *Lord Eldon* decided that the Debt is not in such case destroyed unless a Commission was issued (x).

If a Creditor receives Money or Goods from a Bankrupt after an act of Bankruptcy committed, the payment will be valid if the Creditor had no notice of the Bankruptcy (y); but if a Creditor obtains Goods from his Debtor on Credit, just before he breaks, he will not be allowed to prove the Sum remaining due to him, *unless he gives up the Goods* (z).

An equitable Creditor, as before observed, cannot take out a Commission, but a Debt either in *Law* or *Equity* may be proved under a Commission (a); and in deciding upon the proveableness of Debts, the Chancellor is understood to govern himself, as to *legal Debts*, by the Rules of Law, and as to *equitable Debts*, by the Rules of Equity, regarding the claims of each Creditor as a Suit depending (b).

What are good *legal* Debts, and proveable as such, is a pure question of Law, and on a Plea of Bankruptcy and a Certificate, is determined upon by Courts of Law, and therefore will not 651*] here be treated upon: *and with regard to what is a good *equitable* Debt, as to which Courts of Law have no cognizance, so much has already been observed in the foregoing parts of this Work that little remains to be said.

All debts recoverable in a Court of Equity by Trustees, Legatees, and others, may be proved under the Commission, though (as before observed) they will not support a Commission; so they may be set off, and are barred by the Certificate. Though a Debt could be recovered in a Court of Law, yet if the Chancellor would restrain the Action by an Injunction, the Commissioners ought not to admit it in Bankruptcy, even if a Judgment is obtained at law (c).

The consideration of every Debt attempted to be proved

(s) Ex parte Farr, 9 Ves. 513.

(t) 5 Geo. 2, c. 31, s. 24.

(u) Ex parte Gedge, 3 Ves. 349.

(x) Ex parte Browne, 15 Ves. 474.

(y) Hawkins v. Penfold, 2 Ves. 550.

(z) Ex parte Smith, 3 Bro. C. C. 46.

(a) Ex parte Murphy, 1 Sch. & Leffr. 48.

(b) Ex parte Dewdney, 15 Ves.

498. Ex parte Williamson, 2 Ves.

582. Jeffs v. Wood, 2 P. Wms. 123.

(c) 2 Chris. Bank Law, 474.

may be impeached before the Commissioners. Even a *Judgment* may be so impeached (*d*).

Where Executors become Bankrupt, after misapplying the Assets, the Debt may be proved under the Commission, although no account has been previously taken, or Decree made (*e*).

A Legacy due from an Executor who admits Assets, is in Equity a Debt due from such Executor, and proveable under a Commission against him (*f*); and where an Executrix married, and her Husband and she admitted Assets on a Bill filed against them, the Assets, it was held, became a Debt against him (*g*).

*A Legacy given to *A*. payable at Twenty-one, or Mar- [*652 riage with Interest, is a vested Legacy; and if the Executor becomes Bankrupt, it may be proved under his Commission, and will be barred by the Certificate (*h*).

An Executor may prove under his own Commission for that which he is entitled to as Executor against his own Estate, but he will not be suffered to take the Dividends (*i*).

Under the Bankruptcy of an Executor and Trustee directed by the Will to carry on a Trade, and a limited sum to be paid by the Trustees for that purpose, the *general Assets* beyond that Fund are not liable (*k*).

Sums secured by *Covenant* in Marriage Settlements, if payable, *certainly*, though in *future*, are proveable, with a rebate of Interest; but it is otherwise where the Sum is payable on a *contingency* (*l*); as, in case the Bankrupt's Wife survives him (*m*); but if a *Judgment* has been given to secure payment on the contingency, it may be proved (*n*).

Property of the Wife agreed to be settled by the Husband, may be proved under his Commission (*o*).

If a Person in consideration of Marriage, recites in a Settlement that he is possessed of two thousand *Pounds Stock, [*653 and covenants with Trustees to transfer them, immediately after the Marriage, or on request, two thousands Pounds Stock for the benefit of his Wife and Children, and a request is made to

(*d*) Ex parte Bryant, 1 Ves. & Bea 214.

(*e*) See Wheldale v. Wheldale, 16 Ves. 379, where this doctrine is stated and not denied; and see ex parte Leek, 2 Bro. C. C. 596.

(*f*) Jeffs v. Wood, 2 P. Wms. 130.

(*g*) Ex parte M'Williams, 1 Sch. & Lefr. 173.

(*h*) Walcot v. Hall, 2 Bro. C. C. 306.

(*i*) See Ex parte Markland, 2 P. Wms. 546. Ex parte Lecke, 2 Bro. C. C. 596.

(*k*) Ex parte Garland, 10 Ves. 110, overruling Hankey v. Hammond, 1 Cooke's Bank. Law, p. 75, edit. 6; and see ex parte Richardson, 3 Madd. Rep. 138, and p. 148, in note, where Hankey v. Hammond, (or rather Hammock,) is fully stated from the Registrar's Book.

(*l*) See ex parte Mitford, 1 Bro. C. C. 398.

(*m*) Ex parte Groome, 1 Atk 115.

(*n*) Ibid. 117. Ex parte Mitchell, 1 Atk. 121.

(*o*) Ex parte Cooke, 2 Ves. 353.

him to transfer the same, and after such request he becomes Bankrupt, and it turns out that he had no such Stock at the time of his Marriage, as recited in the Settlement, the Trustees may prove to the value of the Stock and the arrear of Dividends (*p*). If no request had been made, no proof would have been admitted (*q*).

If a Settlement be made, previous to Marriage, of Money, the Property of the Wife, upon certain Trusts, with a power to advance the Husband so much on Bond, and that the Trustee should, when he thought proper, recover and receive the Principal, and apply the Interest to the Husband for Life, if he should so long continue solvent, but if he should become Bankrupt, then, on other Trusts, it was held that the amount of the Bond was proveable under a Commission against the Husband (*r*). But a Bond by a Husband to pay a Sum in the event of his Bankruptcy or Insolvency, cannot stand as against Creditors (*s*), except as to so much as he received as the Wife's Fortune (*t*); for otherwise great frauds on Creditors might be practised.

654*] *The Widow of a Bankrupt may prove to the Amount of a Sum agreed by his Marriage Settlement to be laid out (*s*).

If there be an Agreement to replace Stock upon demand, and a demand is made before the Bankruptcy, the price may be proved (*t*).

A Covenant within seven years, or when requested, to convey Lands of a given value in particular Counties, will not entitle the Covenantee to prove in Bankruptcy after the expiration of the seven years, and no request made, unless the Covenant be secured by a Penalty (*u*).

A Bond given on Marriage to a Trustee to pay so much to the Wife, if she survives her Husband, is contingent, and cannot be proved (*x*).

Formerly, where there was Principal and Surety, and the Surety paid the Debt, he was entitled to have an Assignment of the Security, to enable him to obtain satisfaction for what he had paid above his own Share (*y*); and a Surety in a Bond might compel the principal Creditor to prove the Bond under

(*p*) Ex parte Campbell, 10 Ves. 248; and see ex parte Groome, 1 Atk. 114.

(*q*) 16 Ves. 248; and see Utterson v. Vernon, 3 T. R. 529. 4 T. R. 570, and what is said ex parte Grainger, 10 Ves. 350.

(*r*) Ex parte Hinton, 14 Ves. 599. Locker v. Savage, 2 Str. 947; see also ex parte Cooke, 8 Ves. 353.

(*s*) Ex parte Cooke, 8 Ves. 353. Ex parte Hill, mentioned 2 P. Wms. 498, n. 1; and see Assignees of Gardiner v. Shannon, 2 Sch. and Lefr. 278.

(*t*) Ex parte Meaghan, 1 Sch. & Lefr. 179. Ex parte Young, 3 Madd. Rep. 124.

(*u*) Ex parte Gardiner, 11 Ves. 41. see also ex parte Grainger, 10 Ves. 349.

(*x*) Ex parte Mare, 8 Ves. 337.

(*y*) Ibid. 335; and see ex parte Groome, 1 Atk. 117.

(*z*) Ex parte Caswell. 2 P. Wms. 497, overruling Holland v. Culliford, 2 Vern. 662.

(*y*) Ex parte Crisp. 1 Atk. 135.

the Commission ; and if the Surety paid the *whole*, the Creditor was held to be a Trustee of the dividends for him (z). And if a Surety before the Bankruptcy paid part of the Debt, he might prove for so much as he had paid, even to the prejudice of Dividends* the Bond-holder would have had out of the Es- [*655 tate (a) ; but it was not decided, that if the Creditor received part of his Debt from a third Person, not under any obligation to pay, he would have a right to receive dividends upon his whole proof (b). Now, however, by a recent Statute, any Person who is Surety for, or liable for, any Debt of a Bankrupt, if he has not had notice of an Act of Bankruptcy, or that he was Insolvent, or had stopped Payment, may prove for what he pays, in consequence of such Suretyship, although the same be paid after the Commission has issued, or if the Principal has proved, is entitled to take the benefit of his proof ; but if a Dividend has been paid under the Commission, previous to such proof by the Surety, he is only entitled to share the benefit of the future dividends (c).

By a general Order (d) a Mortgagee (unless he is, what is termed, an equitable Mortgagee, in which case a *Petition* is necessary (e), and he pays the Costs, unless he be under such a *written Agreement* (f),) may, if he chooses, without a *Petition* for that purpose, come in under the Commission ; and in such case the Commissioners are empowered to scrutinize the Mortgage, and take an account of what is due and put up the mortgaged Premises to Sale, and out of the produce pay the Expense of the Sale, and *what is due to the Mortgagee for Princi- [*656 pal, Interest, and Costs, and the Surplus, if any, to the Assignees, and if there be a deficiency, the Mortgagee may prove to the Amount of the same under the Commission, but in such case he cannot charge Interest beyond the date of the Commission (g). The Commissioners, in these cases, are authorized to direct all proper parties to join in the Conveyance of the mortgaged Premises to the Purchaser (h).

If, however, a Mortgagee, on a low valuation of the Estate, elects to give up his Mortgage, and proves the whole Debt under the Commission, and afterwards finds, on the Sale of the Estate by the Assignees, that it produced a much larger sum than it was valued at, he will not be allowed to withdraw his proof, and have the benefit of the Mortgage (i).

(z) *Ex parte Turner*, 3 Ves. 243. *C. 500, 1 ; and see 8 Ves. 105, and ex parte Rushforth*, 10 Ves. 409. 2 *Christ. Bank. Law*, p. 319.

Payley v. Field, 12 Ves. 435 ; and (e) *Ex parte Payler*, 16 Ves. 434.

see *ex parte Leers*, 6 Ves. 646. S. P. *Anon. MS. 1306.* As to equitable Mortgages, see ante, 1 vol. p. 539.

(a) *Ex parte Wood*, noticed in *ex parte Rushforth*, 10 Ves. 416. (f) *Ex parte Brighting*, 1 *Swanst.* 3.

(b) *Vid. ex parte Rushworth*, 10 Ves. p. 413, in arg.

(c) 49 *Geo. 3. c. 121, s. 8*, and see (g) *Ex parte Badger*, 4 Ves.

ex parte Lloyd, 1 *Rose*, 4. (h) 4 *Bro. C. C. 551.*

(d) *Vide General Order*. 4 *Bro. C.* (i) *Ex parte Downes*, 18 Ves. 290.

A Mortgagee of a Bankrupt's Interest will be allowed, on *P*etition, to bid for the same, on a Sale of the mortgaged Estate (*k*).

The Court, on a Petition by an equitable Mortgagee for the Sale of the Estate, will itself decide on the validity of the equitable Mortgage, and if established, a reference is then made to the Commissioners to ascertain what is due upon it (*l*). Where an equitable Mortgagee petitions for the Sale of the Estate, the Costs of the Petition, and of the Assignees appearance to it, are paid by the Mortgagee personally, and not out of the mortgaged Estate; but if the Assignees oppose the Petition frivolously, or 657*] on *mistaken grounds, they pay the Costs occasioned by such opposition (*m*.)

Unless the Mortgagor applies to prove his Debt, the Commissioners have no authority to dispose of his Security against his consent (*n*), and that, though he be merely an equitable Mortgagee, by a deposit of Deeds (*o*); and if a second Mortgagee does not claim under the Commission, but chooses to rest upon his security, he is not compellable to join in a Sale obtained under the general Order, by a prior Mortgagee, which did not produce enough to satisfy both Mortgages (*p*).

If a Son entitled in Remainder, joins his Father in a Mortgage, which is not paid off till after the Bankruptcy of the Father, the Son cannot prove his interest under the Commission (*q*).

If a Bill of Exchange be lost, it may be proved, under the Commission, upon giving of an Indemnity against any Claim in respect of the Bill (*r*).

When proof is made on a Bill, which has been partly paid before the proof, the proof is only for so much as remains unpaid; but where proof was offered to be made on a Bill, but was rejected by the Commissioners, and a Petition was presented, and the decision of the Commissioners overruled, and between the offer to prove and the determination on the Petition, part of the Bill was received by the Holder, in that case no deduction of 653*] what was so received was *made, but the proof was considered as made when the party first applied to prove, at which time he had not received any thing on the Bill (*s*).

In Bankruptcy, the Penalty of an *Annuity Bond* having become, in a certain sense, a Debt, an equitable arrangement is made by which the Annuity Creditor is neither confined on the

(*k*) Ex parte Marsh, 1 Madd. Rep. 148.

(*l*) Ex parte Jennings, 1 Madd. Rep. 331.

(*m*) Ex parte Horne, 1 Madd. Rep. 623.

(*n*) Ex parte Jackson, 5 Ves. 357.

(*o*) Ex parte Topham, 1 Madd. Rep. 138.

(*p*) Ex parte Jackson, 5 Ves. 357.

(*q*) Kitlear v. Raynes, 1 Bro. C. C. 384.

(*r*) Ex parte Greenway, 6 Ves. 812.

(*s*) Ex parte Royal Bank of Scotland, 19 Ves. 310. S. C. 2 Rose, 197.

one hand to the instalment then due, nor permitted on the other to claim the full Penalty ; but a *value* is set upon the Annuity (t) ; and the price stipulated for the redemption of any Annuity affords no conclusive criterion of the value of the Annuity (u). The 49th Geo. 3, c. 121, s. 17, gives no rule for determining the value of an Annuity. The value, it seems, is to be determined as it stands at the time of the Commission, by considering the original price given for the Annuity, with the variation in value arising from the lapse of time since the grant, where there are no peculiar circumstances in the case ; and the Petitioner is also allowed to prove the arrears of an Annuity up to the last day on which the Annuity was payable before the date of the Commission (x).

Where, however, an Annuity, part of the Price of an Estate, was granted for the Life of the Grantee, aged thirty-two, and taken at an undervalue, owing to his state of health, then not insurable, but afterwards restored, and secured on Bond and Judgment, it was held the value to be proved on the Bankruptcy *of the Grantor two years afterwards, was not, under [*659 the peculiar circumstances, to be calculated according to the market price nor the price paid originally, with the variation occasioned by the lapse of time, since established as the general rule (y), but was to be calculated according to the actual value at the Bankruptcy, with reference to the Grantee's age and improved health, the contract involving a contingent risk with reference to the Grantee's health, which might have turned entirely against him (z). Where the Grantor of an Annuity, secured by real Property, becomes a Bankrupt, and Arrears of the Annuity become due after the Bankruptcy, the real Security will, on the Petition of the Grantee be ordered to be sold, and the produce applied in satisfaction of so much of the Arrears and value of the Annuity as the same will extend to satisfy, and the Grantee will be allowed to prove the residue under the Commission (a). If the Creditor rests upon the *Covenant*, the *Arrears* only of the Annuity actually *become due*, can be proved (b).

A *voluntary Bond*, it has been held, may be proved, but that the party cannot take any thing under the Commission, unless there be a surplus after payment of all the joint and separate Debts (c).

(t) See *Butcher v. Churchill*, 14 Ves. 574. *Ex parte Le Comte*, 1 Atk. 251. *Ex parte Bilton*, *ibid.* 251. *Ex parte Artis*, 2 Ves. 489.

(u) *Vid. Ex parte Whitehead*, 1 Merr. p. 10.

(x) *Ib.* p. 127, 724.

(y) *Ex parte Whitehead*, 1 Merr. 10. 127.

(z) *Ex parte Thistlewood*, 19 Ves. 236.

(a) *Ex parte Key*, 1 Madd. Rep. 426.

(b) *Ex parte Granger*, 10 Ves. 351. See *Fletcher v. Bathurst*, 7 Vin. 71. pl. 4.

(c) *Assignees of Gardner v. Skinner*, 2 Sch. & Lefr. 223, but see the observation of Mr. Christian, 1 vol. Bankrupt Law, p. 174.

660*[In a case of Bankruptcy, a joint Bond entered *into by mistake has been considered as joint and several (d).

A specially Creditor has the same right under the Bankruptcy of the Heir of the Debtor as if he had not become Bankrupt, and may therefore follow the real Assets, on their specific produce in the hands of the Assignees (e).

A Debt which could not be recovered in an Action upon a Plea of the Statute of Limitations, nor in Equity, in analogy to that Statute, cannot be proved under a Commission of Bankruptcy (f).

No Interest on the Balance of a stated Account is proveable under a Commission, unless by express contract (g).

A Creditor giving personal attendance before the Commissioners for the purpose of proving his Debt, cannot be arrested (h).

Of Lien ; Set-off ; and Stoppage in Transitu.

In determining upon the Debt to be proved, questions as to a Lien, or a Set-off, often arise ; but as points of this kind are mostly Questions of Law, it is not necessary to enter into all the doctrine on the subject. Factors, Brokers, Bankers, Carriers, Attornies, and others, may all insist on the Lien which the Law has given them, the same not being taken away by a Commission of Bankruptcy.

661*] *If Bills be sent for the purchase of *Specie*, and before such Commission is executed, the Agent becomes a Bankrupt, the Principal has a lien on the Bill, or produce of the same, in the hands of the Assignees (i) ; for the Bankrupt was only a Trustee.

If the Bills had been sent to buy *goods*, a doubt has been expressed whether the Party would have had a Lien on the Bills (k).

If upon a Contract for the Sale of a real Estate the Purchase Money is not paid, and the Purchaser becomes a Bankrupt, the Vendor has a Lien on the Estate for the Purchase Money (l).

A Packer may retain goods till he is paid the price of packing, and if he has another Debt due to him from the Bankrupt, he may retain the Goods till such Debt is paid (m) ; but this,

(d) Vid. case mentioned in 3 Ves. 400, in note.

(e) Ex parte Morton, 5 Ves. 449.

(f) Ex parte Dewdney, and ex parte Seaman, 15 Ves. 479.

(g) Ex parte Furneaux, 2 Cox, 219.

(h) Ex parte King, 7 Ves. 513, 514, 516. List's Case, 2 Ves. & Bea. 373. S. C. 2 Rose, 49. Ex parte Bryant, 1 Madd. Rep. p. 49.

(i) Ex parte Sayer, 5 Ves. 169 ; and see ex parte Dumas, 1 Atk. 232. S. C. 2 Ves. 582. And see 5 T. R. 215. 2. H. Black. 501.

(k) 5 Ves. 173.

(l) Bowles v. Rogers, 1 Cook. Bank. Law, 139, edit. 6. Cowel v. Simpson, 16 Ves. 278. As to this Lien, see ante.

(m) Ex parte Deeke, 1 Atk. 228.

it seems, is so, because such is the understood agreement between Packers and their employers (n).

A person who repairs a Ship, has no specific Lien, if delivered to the Bankrupt: if repaired in a foreign port, while out upon a voyage, it would be otherwise (o).

Without an usage or agreement, there cannot be, either in Law or Equity, a Lien for a general balance (p).

*All Debts which can be proved under the Commission [*662 may be set off or balanced against demands made by the Bankrupt (g).

A person may set off a Debt under the Bankrupt Acts, though not relative to the mutual credit between him and the Bankrupt (h).

Lord Hardwicke seems to have thought that a Court of Equity does not go farther than a Court of Law in cases of set-off (i); but *Lord Rosslyn* held that there may be an equitable set-off in case of Bankruptcy, though there were no mutual Debts upon which a set-off could be sustained at Law (k), as in some cases of fraud (l); and a recent writer, in his excellent work on the Bankrupt Law (m), has adduced very strong reasons to prove that the jurisdiction in Bankruptcy relative to set-off was derived from the 13th Eliz. c. 7, s. 2, in the first instance, strengthened by the 4th and 5th Ann. c. 17, s. 11, which afterwards expired, and subsequently enforced by the full and clear enactment of the 5th Geo. 2, c. 30, s. 28, but is wholly unconnected with the 2d Geo. 2, c. s. 13, as to set-off, though many Judges appear to have acted upon a different opinion. It is, however, to be lamented, that if this construction, favourable as it is to the Creditors, be just, and the opinion of *Mr. Justice Buller* be *correct, that a set off may be given in evidence at Law, under the general issue of the 5th Geo. 2, c. 30, s. 28 (n), it follows, that an equitable set-off might be given in evidence, as it is allowed under the Statutes in Bankruptcy; and thus, contrary to the general policy of the Law, the Common Law Judges would have to determine upon a point of Equity. How could they act in cases of fraud? If, on the other hand, they have no jurisdiction in any case as to a set-off, where a Bankruptcy has taken place, the inconvenience would

(n) *Ex parte Ockenden*, 1 Atk. 237.

(o) *Ex parte Shank*, 1 Atk. 234.

(p) 1 Christian's Bank. Law, 291.

(g) Christian's Bankt. Law, 288.

(h) *Ryall v. Rolle*, 1 Atk. 185. S. C. 1 Ves. 375. See what is said of *Mr. Justice Burnett's* Judgment in this Case, ante 1 vol. p. 256, note (c).

(i) *Ex parte Oxenden*, 1 Atk. 237; and see *Bishop v. Church*, 3 Atk. 691.

(k) *James v. Keymier*, 5 Ves. 108.

(l) *Ex parte Stephens*, 11 Ves. 24.

Of this Case *Lord Eldon* says, "I have heard doubts, entitled to considerable respect, at least, as to the length I am supposed to have gone in that instance; and but for the fraud I should have doubted much whether that decision was right." *Ex parte Blagden*, 19 Ves. 467.

(m) See *Christian's Bank. Law*, p. 278.

(n) See what is said by him in *Grove v. Dubois*, 1 T. R. 112. cited and seemingly approved, by *Mr. Christian*, 1 Bank. Law. p. 263.

be great, as the party incapable of supporting a set-off at Law would be driven to obtain an injunction (*o*), or rather, perhaps, to petition the Chancellor (*p*).

At Law there can be no set-off between joint and separate Debts (*q*); but it is not so in Bankruptcy, where the Chancellor having an equitable as well as a legal jurisdiction, and the Assignees taking, subject to all equities attaching upon the Bankrupt, there are cases, where, upon equitable principles, a *separate Debt* due from a Bankrupt has been allowed to be set off against a claim by Assignees of a *joint Debt*, by principal and surety, due to him (*r*); and in other cases of the kind, where the Equitable interference is on the ground of *Fraud* (*s*), or 664*] otherwise (*t*); but *where the Court does not find a *natural Equity going beyond the Statute*, the doctrine has been held to be the same in Equity as at Law (*u*).

It seems, however, that under a separate Commission against one Partner, a Debt due by a separate Creditor to the Partnership, cannot, from the inconvenience it would occasion, be set off against the claim of the separate Creditor, notwithstanding the natural Equity for doing so (*x*).

If *A*. be indebted to the Bankrupt before his Bankruptcy, and a Creditor upon him, in respect of a contingency taking place after the Bankruptcy, it is not matter of set-off (*y*).

An Acceptance not due till after the Bankruptcy of the Drawer is capable of set-off, within the clause of the Act (5 Geo. 2, c. 30, s. 28,) as to mutual credit (*z*).

A Bond though payable at a future day may be set off (*a*).

If Bankers receive and pay money on account of a Bankrupt after notice of an act of Bankruptcy, all the sums received are considered as received for the use of the Estate, and they cannot set off the payments made, or be allowed to come in as Creditors, and claim dividends on Debts paid which were owing before an act of Bankruptcy (*b*).

665*] A Debt due to *A*. from *B*. a Bankrupt, in *autre droit*, cannot be set off against a Debt due from *A*. to the Bankrupt's estate (*c*).

By the 46th Geo. 3, c. 135, s. 3, in all cases in Bankruptcy, where there has been mutual Credit, or mutual Debts, there

(o) See *Billon v. Hyde*, 1 Atk. 126.

(p) *Saxton v. Davis*, 1 Rose, 79.

(q) *Ex parte Quintin*, 3 Ves. 248.

(r) See *ex parte Hanson*, 12 Ves. 346; but see on this subject *Bishop v. Church*, 3 Atk. 641. S. C. 1 Ves. 100, 371.

(s) *Ex parte Stephens*, 11 Ves. 24.

(t) See *ex parte Quintin*, 3 Ves. 248; but see *ex parte Twogood*, 11 Ves. 517, where Lord Eldon expresses his disapprobation of that distinction; and see *Addis v. Knight*, 2 Mer. 122.

(u) 11 Ves. 27; and see *ex parte Christie*, 10 Ves. 105.

(x) *Ex parte Twogood*, 11 Ves. 517; and see *ex parte Christie*, 10 Ves. 105. See the doubt expressed in *ex parte Exwards*, 1 Atk. 100.

(y) *Ex parte Groom*, 1 Atk. 119.

(z) *Ex parte Wagstaff*, 13 Ves. 65.

(a) *Ex parte Prescott*, 1 Atk. 230.

(b) *Hankey v. Vernon*, 3 Bro. C. C. 313.

(c) *Bishop v. Church*, 3 Atk. 691.

may be a set-off, notwithstanding any prior act of Bankruptcy committed by the Bankrupt before the Credit was given to, or the Debt contracted by, the Bankrupt, in like manner, as if no such prior act of Bankruptcy had been committed, provided such credit was given to the Bankrupt two calendar months before the date and suing forth of the Commission, and provided the person claiming the benefit of such set-off had not at the time of giving such credit any notice of any prior act of Bankruptcy by such Bankrupt committed, or that he was insolvent, or had stopped payment.

Questions as to *Stoppages in Transitu* are questions of Law, and will therefore be very shortly observed upon. The right of stopping in *Transitu* is not favoured (d).

It has been holden, that the Consignor cannot stop against the Assignee of the Consignee (e).

Where there is a Sale before a Bankruptcy of a chattel interest, and it has proceeded to the length, that either a total delivery has followed, or such a partial delivery, as both in Law and Equity prevents the stoppage in *Transitu*, the Property is vested in the Purchaser, and belongs to the Assignees.

*There is no instance of a stoppage in *Transitu* being [*666 allowed where there has been a delivery of part (f); but part payment does not take away the right to stop in *Transitu* (g).

Election by Creditor.

By a recent Act of Parliament, it is declared, that from and after the passing of the Act, it shall not be lawful for any Creditor, who has, or shall have brought any Action, or instituted any Suit, against any Bankrupt, in respect of any demand which arose prior to the Bankruptcy, or which might have been proved as a Debt under the Commission, to prove a Debt under such Commission for any purpose whatever, or to have a claim entered, without relinquishing such Action or Suit, and all benefit from the same; and that the proving or so claiming a Debt shall be deemed an election to take the benefit of such Commission, with respect to the Debt so proved or claimed by him; but it is provided, that such Creditor shall not be liable to the payment to the Bankrupt or his Assignees, of the Costs of such Action or Suit which shall be so relinquished by him; and it is also provided, that where the Creditors shall have brought any Action or Suit against such Bankrupt jointly with any other per-

(d) 1 New Rep. 63.

(e) Lickbarrow v. Mason, 2 T. R. 623, reversed in Error, 1 H. Bl. 357; and on appeal to the House of Lords a new Trial ordered, 2 H. Black, 211. See Mr. Just Buller's Judgment in House of Peers, 6 East, 21.

On the new trial, the K. B. retained their former opinion.

(f) See Hammond v. Anderson, 1 New Rep. 63. Ex parte Gwyne, 12 Ves. 383.

(g) Hodgson v. Long, 7 T. R. 440.

son or persons, his relinquishing such Action or Suit against such Bankrupt or Bankrupts shall not in any manner affect such Action or suit against such other person or persons (*h*).

667*] *The words in this Act "proving a Debt under this Act shall be deemed an election to take the benefit of such Commission," are construed to relate to cases where a Party who has proved under a Commission, sues the same person under whose Commission he has proved. Where, therefore, separate Commissions of Bankruptcy were issued against three or four Partners, to which they conformed, and passed their examination, and an Order was made for allowing the joint Creditors to prove their Debts under the Commission of one of the three, under which Commission the Plaintiffs proved their joint Debt, and afterwards sued all the Partners for the same Debt, and arrested one of the other two under whose Commission they had not proved, it was held that he was not entitled to be discharged out of custody (*i*).

This Statute renders it unnecessary to consider most of the cases on the subject of Election previously determined.

A party applying to prove his Debt, is not under this Act obliged to produce a Rule for the discontinuance of his Action; —by proving, he relinquishes his Action (*k*).

If a Bankrupt is taken in Execution after a Commission issued, the Creditor is considered as having made an election (*l*); but if the Creditor has the Bankrupt in Execution at the time the 668*] Commission *issues, he may elect (*m*), but is not bound to elect before a Dividend (*n*).

A Creditor is not in general put to an election until he has had an opportunity of ascertaining whether it will be most for his benefit to proceed at Law, or to come in under the Commission, an opportunity which Creditors in general cannot have until a dividend is declared (*o*), and therefore till a dividend is made they are not compellable to elect (*p*); but there is an exception to this rule in the case of an Assignee who has not claimed or proved his Debt (*q*), and has delayed making a dividend, in which case, if he has any fund in his hands, the Chancellor will oblige him to elect within a given time (*r*).

It has been held, that if a Creditor has demands upon the

(*h*) 49 Geo. 3. 121. s. 14.

(*i*) Young and others v. Glass, 16 East, 252; and see Heath v. Hall, 4 Taunton, 326.

(*k*) Ex parte Wooley, 2 Ves. & Bea. 253. S. C. 1 Rose, 394.

(*l*) Ex parte Cator, 3 Bro. C. C. 216. Ex parte Warder, 3 Bro. C. C. 191. Ex parte Knowel, 13 Ves. 192. Ex parte Panquet, 14 Ves. 193.

(*m*) Ex parte Knowel, 13 Ves. 192.

(*n*) Ex parte Warwick, 14 Ves. 138.

(*o*) Ex parte Sharpe, 11 Ves. 204. The rule has given rise to some very oppressive conduct, as in the case, ex parte Callow, 3 Ves. 1.

(*p*) Ex parte Sharpe, 11 Ves. 203.

(*q*) Ex parte Ward, 1 Atk. 153. 49 Geo. 3. c. 121. s. 14.

(*r*) Ex parte Grosvenor, 14 Ves. 587.

Bankrupt of *Distinct natures*, or in *different rights*, he is at liberty to prove one under the Commission, and proceed at Law for the recovery of the other (*s*) ; as a *Bond Debt*, and a Debt by *Simple Contract* ; or a Bond, and a demand for rent (*t*) ; nor is this doctrine affected by the late Statute (*u*) ; but where the Creditor might comprise the whole demand in one Action, as for goods sold at *different times, he is not permitted to [*669 split it, and proceed at Law for part, and come under the Commission for another part (*x*).

The Petitioning Creditor is considered as having made his election (*y*), and not only as to the Debt upon which the Commission is founded, but as to all Debts due to him from the Bankrupt (*z*).

Where, in cases of Partnership, there are joint and separate Commissions, persons who are both joint and separate Creditors must elect whether they will claim upon the joint or separate Fund ; nor does a Creditor on a *joint and separate Bond* lose his right to elect by having a Bill drawn in the joint names of the Creditors, on third persons, indorsed to him (*a*).

If a Bankrupt surrenders in discharge of his Bail, and the Creditor does not proceed to charge him in Execution, in consequence of which he is discharged, it does not amount to any election (*b*).

Petitions in Bankruptcy.

An Assignee under a Commission of Bankruptcy cannot by Petition call upon a person who claims nothing under the Bankruptcy. If such person possesses* property belong- [*670 ing to the Bankrupt, the Assignee must bring an Action, or file a Bill. (*d*).

All Petitions in Bankruptcy must before they are presented for hearing, be signed by the Petitioners, except in cases of Partnership, or absence from the kingdom : in the former case, the signature of one of the Partners is sufficient, and in the latter, the Petition must be signed by the person presenting the same, on behalf of the person so abroad ; and the signature of each person signing as a Petitioner, (unless such Petitioner be a

(*s*) Ex parte Grove, 1 Atk. 105 ; and see ex parte Matthews, 3 Atk. 816.

(*t*) See ex parte Botterill, 1 Atk. 109. Ex parte Grosvenor, 14 Ves. 589 ; and see ex parte Crinsoz, 1 Bro. C. C. 270.

(*u*) 49 Geo. 3 c. 121. s. 14.

(*x*) Ex parte Grosvenor, 14 Ves. 587 ; and see ex parte Matthews, 3 Atk. 817.

(*y*) Ex parte Hopkinson, 1 Ves.

jun. 159. Ex parte Lewis, 1 Atk. 154. Ex parte Ward, 1 Atk. 153. Ex parte Callow, 3 Ves. 2. Ex parte Bryant, 1 Ves. & Bea. 215.

(*z*) 1 Cooke's Bankrupt Law, 30. Gregg's edit.

(*a*) Vid. ex parte Hay, 15 Ves. p. 4. Ex parte Rowlandson, 3 P. Wms. 405.

(*b*) Ex parte Cundall, 6 Ves. 446.

(*d*) Ex parte Pease and others, 19 Ves. 47.

Solicitor) (e), must be attested by the Solicitor actually presenting the Petition, or by some person who shall state himself in his attestation to be attorney, Solicitor, or Agent of the party signing in the matter of the Petition (f). Nor can a Petition once presented and answered be withdrawn without leave. The title of a Petition in Bankruptcy has been allowed to be altered on paying the Costs of the day (g).

A Bankrupt Petition attested by the agent of the Attorney who presented the Petition, is not a sufficient compliance with the general order (h). When an improper Petition in Bankruptcy was presented, the Attorney under the circumstances was ordered to pay the Costs (i).

671*] **Surrender and Examination of Bankrupt and others.*

By the 5th Geo. 2, c. 30, s. 5, the Bankrupt has forty-two days to surrender after notice left at his house, or personal notice, if in prison, and advertisement in the Gazette; but this time for surrendering may, at the instance either of the Bankrupt or his Assignees (k), be enlarged by the Chancellor for a term not exceeding fifty days. If the Bankrupt does not surrender within the time prescribed he is guilty of felony.

If the Bankrupt does not surrender within the time prescribed by the above mentioned Act, he may, by petition to the Chancellor, state circumstances of surprize, or unavoidable accident (l), which prevented his surrender, *illness*, for instance (m), and pray for an order that the Commissioners may be at liberty to appoint a Meeting, and take the Surrender (n); and such Order will be made although the Assignees object (o). An Order to this effect leaves the Commissioners an option whether they will admit the Bankrupt to surrender, or not; nor does it bear a prosecution for not surrendering (p), but is only a sort of intimation that the Chancellor does not think *it fit that he should be capitally prosecuted. If an indictment were preferred, a *pardon* would be granted (q). An omission to surrender, if not wilful, is not a Felony (r). *Lord Macclesfield* in cases of this kind, where the Bankrupt had from *ignorance*, or *accident*

(e) Ex parte Kingdon, 1 Madd. Rep. 446.

(f) Vid. Order 12 Aug. 1809.

(g) Ex parte Rew, 1 Madd. Rep. 309, S. C. 2 Rose, 309.

(h) Ex parte Weston, 1 Madd. Rep. 75.

(i) Ex parte Cuthbert, 1 Madd. Rep. 78.

(k) Fuller's Case, 10 Ves. 189.

(l) Ex parte Dawson, 2 Cox, 48.

(m) Ex parte Bould, 2 Bro. C. C. 49.

(n) Anonymous Case, 15 Ves. p. 1. See also ex parte Jackson, ib. p. 119.

Fuller's Case, 10 Ves. 496. Higginson's Case, ibid., and ex parte Graham, 2 Bro. C. C. 48. Ex parte Shiles, 1 Madd. Rep. 248.

(o) Ex parte Shiles, 1 Madd. Rep. 248. 2 Rose, 381.

(p) Ex parte Ricketts, 6 Ves. 445.

(q) Ex parte Lavender, 18 Ves. 19.

(r) Ambl. 307.

not attend his Examination, would *supersede* the Commission in order to prevent a prosecution (s); but his authority to do so has been questioned (t).

After the Order, the Bankrupt has still an option whether he will surrender or not; and if he does not, it seems, it would not be a *Contempt* (u).

Whether the Bankrupt after such an Order to surrender may be taken in *Execution* by a Creditor before the time has expired, does not appear to have been determined (x). It has, however, been decided that he cannot be *arrested* (y); unless it be at the suit of the Crown (z).

In a case where a Bankrupt has escaped from prison, and was retaken by the gaoler upon his return from an examination on a Surrender, under the Lord Chancellor's Order, after the time prescribed by the Statute for his Surrender, it was not considered as *a Contempt*, and he was held not entitled to his [*673 discharge (h).

It seems doubtful, whether in these cases, where the Party has not surrendered in time, he is entitled to his Certificate, and can be considered as having *conformed* to the Statutes (i).

The Bankrupt is not bound to surrender until the last Meeting; but if the Commissioners have reason to think that he intends to secrete his Effects, they may summon him to be examined in the intermediate period between the finding of the Bankruptcy and the time appointed for his Examination (k). And after a Bankrupt has passed his Examination, he may, at a subsequent day, be further examined (l); and is compellable to attend (m).

So, a Bankrupt, if he chooses, may surrender immediately upon his being adjudged a Bankrupt, and before the first Meeting at Guildhall; and this is usually done, as the Bankrupt, by the surrender, becomes free from arrest for forty-two days from the time of his surrender (n), (which comprehends the whole of the forty-second day (o), and for the time during which such

(s) Ex parte Wood, 1 Atk. 222; and see ex parte Lavender, 18 Ves. 18.

(t) See 1 Christ. B. L. 125.

(u) Ex parte Johnson, 14 Ves. p. 41.

(x) 15 Ves. p. 1.

(y) In the matter of Dalton, 1 Ball & Bea. 130; and see Davis v. Trotter, 8 T. R. 130. In ex parte Jackson, MS. S. C. 15 Ves. 52, it was held, that the Arrest of a Bankrupt, who had been attending a Petition for a Meeting to take his Surrender, and called on his Solicitor upon his way home, was bad.

(z) Ex parte Temple, 2 Rose, 22. 2 Ves. & Bea. 391.

(h) Ex parte Johnson, 14 Ves. p. 36. I think I have heard Lord El-

don say the ground of the Decision in that Case was, that the Bankrupt was considered as never having been out of custody.

(i) See Ambler, 308, and 1 Christian's Bankt. Law, 128, edit. 1.

(k) Ex parte Lingood, 1 Atk. 240. Fuller's Case, 10 Ves. 183.

(l) Davis v. Trotter, 3 Esp. N. P. 40. Rex v. Perrot, 2 Burr. 1124, cit. 1 Cooke. 448. edit. 6; and see 5 Geo. 2, c. 36, s. 1, which seems to enforce such examination, as observed by Mr. Christian's Bank. Law, 1 vol. p. 188.

(m) See Anon. 14 Ves. 451.

(n) Ex parte Wood, 18 Ves. 1. S. C. mentioned 1 Christian's Bankt. Law, 131.

(o) Ex parte Donlevy, 9 Ves. 318.

674*] Examination is adjourned (*p*); and this, *though the Commissioners have omitted to indorse the Adjournment of his Summons (*p*).

To avoid the inconvenience of the attendance of Commissioners in prison to take the examination of Bankrupts charged in execution according to the Statute (*q*); it is provided by the 49th Geo. 3, c. 121, s. 13, that Bankrupts taken in execution may, on their *last examination*, be brought before the Commissioners, as in cases of custody under Mesne Process (*r*).

If a Bankrupt be arrested whilst he is *bona fide at* (*s*), or on his way to (*t*) or from (*u*) his Examination, he will, on Motion and Affidavit, be discharged, a *Petition* not being necessary; nor is such protection founded only on the Act of Parliament, (5 Geo. 2, c. 30, s. 5,) for he is considered as entitled to it without the authority of the Act (*x*). The Protection extends to every mode by which a Creditor can arrest a Bankrupt for a Debt, whether in Law or in Equity (*y*).

Nor does an Arrest at the Suit of the Crown, while the Bankrupt is actually going through his Examination before the Commissioners, form an exception to the Rule (*z*); but the Crown not being bound by the Statutes of Bankruptcy, the protection of a Bankrupt from an *Extent* is limited to *actual attendance* (*a*).

675*] *The privilege of a Bankrupt extends to the case of an Arrest upon an Attachment for non-payment of Money under an Award, made a Rule of Court (*b*), or for non-payment of Money under an order of Court (*c*); but it has been held, that the taking of the Bankrupt by Bail, is not a contravention of the Act of Parliament (*d*).

The Chancellor has refused to discharge a Bankrupt arrested on his return from Commissioners, to whom he had applied to surrender at a private Meeting (*e*).

A Bankrupt imprisoned at the time of the date of his Protection is not privileged against subsequent Detainers (*f*).

Where a Bankrupt is ordered to be discharged, the usual way, is, to direct the Creditor forthwith to cause him to be discharged; by which means the Sheriff is protected from the vexation of an Action for an escape (*g*); and where the Bankrupt is ordered to be discharged, it is generally with Costs (*h*).

(*p*) See 5 Geo. 2, c. 30, s. 6. 1 Cook
Bk. Law, p. 129, ed. 6.

(*q*) Price, ex parte, 3 Ves. & Bea.
23.

(*q*) 5 Geo. 2, c. 30, s. 6.

(*r*) Ibid.

(*s*) See ex parte Russell, 1 Rose,
278.

(*t*) Ogle's Case, 11 Ves. 556.

(*u*) Ex parte Hawkins, 4 Ves. 691.

(*x*) Ex parte King, 7 Ves. 314.

(*y*) Ex parte M'William, 1 Sch.
Bk. 176.

(*z*) Ex parte Russell, 1 Rose, 278.
S. C. 19 Ves. 163.

(*a*) Ex parte Temple, 2 Rose, 22.
S. C. 2 Ves. & Bea. 391.

(*b*) Ex parte Parker, 3 Ves. 554.

(*c*) Ex parte M'Williams, 1 Sch.
& Lefr. 169.

(*d*) Ex parte Gibbons, 1 Atk. 237.

(*e*) Ex parte Ross, 1 Rose, 230.

(*f*) Ex parte Goldie, 1 Meriv. 176.

(*g*) Ex parte Donlevy, 9 Ves.
318.

(*h*) See *ibid*. 318. Ex parte Wood.
18 Ves.

The Chancellor will not make an Order upon the Commissioners relative to their Examination of the Bankrupt (i).

The Examination of the Bankrupt as to particular points *cannot be prevented by an agreement of the friends of [*676 the Bankrupt to pay a sum of Money; such agreement is not binding, it being contrary to the policy of the Bankrupt Law, and having the effect of suppressing an Examination, which is necessary to ascertain, among other things, whether or not the Bankrupt is entitled to his Certificate (k); but a Covenant by a friend of the Bankrupt to pay all his Creditors their full Debt, in consideration that they will not proceed any farther under the Commission, is good (l): an agreement, however, of this description would probably be considered as void, if made under circumstances which might entitle it to the denomination of compounding a Felony.

Let a Bankrupt's conduct be ever so improper he is entitled, under the 5 Geo. 2, c. 30, s. 5, to an inspection of his Books with a view to his Examination (m).

If on the Examination it can be made out that the Bankrupt has concealed, or has not delivered up, a particular book, he may be indicted under the Statute (n).

The question, *as to what* a Bankrupt may be examined, is a question of Law.

If Commissioners commit a Bankrupt for not answering, or for answering in an unsatisfactory manner, the Bankrupt may by an *Habeas Corpus* have the propriety of the questions, or the sufficiency of the *answer, determined upon by the Chan- [*677 cellor, or the Common Law Judges (o).

If a commitment be illegal, an Action lies against the Commissioners (p).

When Commissioners commit a Person, the Chancellor will not interfere upon *Petition* (q), he can do no more than grant a *Habeas Corpus* to bring up the Party; and this, not in virtue of his statutory authority in Bankruptcy, but in virtue of his statutory authority under the Habeas Corpus Act (r); and if the Commitment is legal, the Chancellor has not a discretionary authority to discharge him upon circumstances (s).

It has been held, that it is not a fatal objection to a Commitment of a Bankrupt by the Commissioners, that the Order of

(i) *Ex parte Cridland*, 3 Ves. & Bea. 104.

(k) *Nerott v. Wallace*, 3 T. R. 17.

(l) *Kaye v. Boulton*, 6 T. R. 134. 1 Cooke, 459, edit. 6.

(m) *Ex parte Ross*, 17 Ves. 376.

(n) *Ibid.* 378.

(o) *See ex parte Lingood*, 1 Atk. 212.

(p) *Perkins v. Proctor*, 2 Wils. 382. *Miller v. Seare*, 2 Bl. 1141.

(q) *Taylor's Case*, 8 Ves. 300. *Horne v. Lancy*, 2 Dick. 170. *Ex parte Tomkinson*, 10 Ves. 106; *contra ex parte Lingood*, 1 Atk. 342.

(r) *See ex parte King*, 11 Ves. and *ex parte Page*, 17 Ves. 60. *See post.* p. 553.

(s) *Ex parte Newlan*, 11 Ves. 511. S. C. MS.

Commitment was made in the absence of the Bankrupt, and that it bore date the day the Examination took place, though made some days afterwards (t).

A Bankrupt may be committed by the Commissioners though upon his Examination he swears *positively*, if his answers are not *reasonably satisfactory* (u).

678*] If a question be asked of a Bankrupt, the answer *to which might subject him to a prosecution for Felony, he may, it seems, demur to the question; and if he is committed for not answering, the Chancellor, on a *Habeas Corpus*, would discharge him; but he is bound to answer what may subject him to Penalties, smuggling or gaming transactions for instance (x). Neither is a Bankrupt bound to answer a question that has a tendency to accuse him of a criminal act; but he must submit to the consequence of that refusal being unsatisfactory, if there is nothing unlawful in the question upon the face of it (y).

If a Bankrupt (z), or one who has received the Bankrupt's Money, refuses to account for it because his answer may subject him to Penalties, he will be considered as having so much still in his hands (a).

Where the question of the Commissioners to the Bankrupt was, whether he had communicated to his *Assignees* according to the direction of the Commissioners, "where, and how, Persons named by him were to be found, and if not, why not?" and he answered, "he had not, and could state no reason," the Commitment was held to be illegal, the Commissioners having no authority to delegate their power to examine (b).

If, on an *Habeas Corpus*, the Bankrupt is entitled to be discharged from his Commitment, owing to a defect in form of the Warrant, the Court to whom the *Habeas Corpus* is directed, must under the Statute of 59 Geo. 2, c. 30, commit the Party (c).

679*] The Statute of *Elizabeth* (13 Eliz. c. 7, s. 5,) empowers the Commissioners to call before them all persons known or suspected to have the Property of the Bankrupt in their possession, or to be indebted to his Estate, and to examine such Persons on oath. This authority is confined to Persons of that class, and within that description. The Witnesses, unlike Witnesses at Law, are bound to attend, although their Expenses

(t) Salt's Case, 13 Ves. 361.

(u) Taylor's Case, 8 Ves. 323. 13 Ves. 328. Ex parte Pedley, cit. 1 Cooke, B. L. 462. Ex parte Nowlan, 6 T. R. 118. Cassidy's Case, 19 Ves. 326. The Case contra, Pedley's Case, Leach, 365, is not considered as Law. See ex parte Oliver, 2 Ves. & Bea. 250.

(x) Ex parte Meymot, 1 Atk. 200.

(y) Ex parte Oliver, 2 Ves. & Bea. 250.

(z) Ibid.

(a) Ex parte Symes, 11 Ves. 521.

(b) Cassidy's Case, 19 Ves. 324.

(c) Ibid. 325.

should not have been tendered, nor are they entitled to have their Expenses paid until the Examination is concluded (*d*).

Assignees.

By the 5th *Geo. 2, c. 30*, it is enacted, "that the Commissioners shall forthwith, after they have declared the Person against whom a Commission shall issue, a Bankrupt, appoint a time and place for the Creditors to meet, in order to choose an Assignee or Assignees of such Bankrupt's Estate, and Effects;" but the Assignees, if they find it expedient, may adjourn the appointed Meeting for the choice of Assignees (*e*).

Until Assignees are chosen, the Bankrupt represents his Estate; so that if a Bill drawn by the Bankrupt is dishonoured after the Bankruptcy, and before the choice of Assignees, notice of such dishonour must be given to the Bankrupt (*f*).

The choice of Assignees is given to the majority of the Creditors in *value*, present at the Meeting for the choice of Assignees, having Debts to the amount of *10*l.* and upwards, as [*680 Persons the most interested in the distribution of the Property, subject to a control by the Chancellor, the largest, most general, and unqualified of any of the Authorities given to him in Bankruptcy (*g*). Commissioners upon the day for choosing Assignees, which is always at the second Meeting, are not to examine critically into the Debt, but to admit Creditors for what they swear is due to them, as they are liable to account afterwards (*h*); but though the Creditor swears positively, yet if the Commissioners have just grounds to doubt the fairness of the Debt, they do right to admit it only as a *claim* (*i*). The circumstance of some of the Creditors, whose votes would have turned the scale, being absent *abroad* (*k*), or by *accident*, will not invalidate the choice; but it would be different if Creditors were kept back by *fraud* (*l*).

If the Debt of one Creditor be so great as to amount to more in value than the other Debts, he may choose himself as Assignee (*m*).

A Person buying up Debts of the Bankrupt is only entitled to one vote (*n*).

Separate Creditors cannot vote for Assignees under a joint Commission (*o*) unless the joint Creditors are paid in full; nor

(*d*) *Ex parte Roscoe*, 1 Meriv. 191,

(*e*) *Ex parte Garland*, 1 Madd. Rep. 318.

(*f*) *Ex parte Moline*, 19 Ves. 216.

(*g*) 1 Atk. 69.

(*h*) *Ex parte Surtees*, 12 Ves. 12.

(*i*) *Ex parte Simpson*, 1 Atk. 68.

(*j*) *Ibid.* 71.

(*k*) *See ex parte Grignier*, 1 Atk. 90.

(*l*) *Ex parte Surtees*, 12 Ves. 12.

(*m*) 1 Cooke's Bank. Law, 275, Gregg's edition.

(*n*) Anon. 15th Jan. 1804, MS.

(*o*) *Ex parte Taitt*, 16 Ves. 193. *Ex parte Jepson*, 19 Ves. 224.

can joint Creditors vote in the choice of Assignees under a separate Commission (*p*).

681*] *The Assignees thus chosen are entitled to the custody of the Papers, usually termed the Proceedings, under the Commission (*q*).

The attendance of a Bankrupt on the Assignees, to assist them in making out the Accounts of his Estates, seems to be confined by the 5 Geo. 2, to the forty-two Days, or the enlarged time at most; but if the Assignees will undertake for the Creditors under the Commission, that they shall not arrest him, the Court will order him to attend, notwithstanding any risk he may run from his Creditors at large (*r*).

The Assignees represent the Creditors, and can bind them, for purposes connected with their Trust of distributing the Property under the Bankrupt Law; but have no authority, it seems, to enter into an agreement disposing of the Surplus of the Bankrupt's Estate after payment of 10*s*. in the Pound (*s*).

By the 40th Geo. 3, c. 121, s. 3, if the Creditors do not direct how the Money arising from the Bankrupt's Estate shall be paid in, the Commissioners have an authority given them for that purpose, and may, upon the application of the Assignees, order the Money paid in to be invested in Exchequer Bills.

Assignees are considered as Trustees, and Lord Eldon seems to have thought an Assignee is liable for the misconduct of his Co-Assignee (*t*).

If one be chosen Assignee under an Estate to which the Assignee is indebted, and Accounts exist between *them, the Chancellor will not, on Petition, remove the Assignee in the first instance, but will appoint another Assignee with a power to review his Accounts, and if it be found necessary to file a Bill against the Assignee, a Petition may then be presented to have him discharged (*u*).

It is the duty of the Assignees to sell all the Bankrupt's Property, as soon as it can be done with advantage; nor are they justified in deferring a Sale of a Bankrupt's Estate, though with the honest view of procuring Money for it (*x*), unless all the Creditors agree; for if any one Individual Creditor refuses to defer the Sale, and a loss is incurred by not selling, the Assignees, it seems, will be compelled to make good such loss (*y*). The

(*p*) Ex parte Parr, 1 Rose, 78. S. C. 18 Ves. 65. See the remarks of Mr. Christian on this subject, 1 Bank. Law, 250, and *ibid.* 2 vol. p. 179.

(*q*) Ex parte Scarth, 15 Ves. 293.

(*r*) Ex parte Turner, 1 Atk. 148.

(*s*) Ex parte Barft, 12 Ves. 15.

(*t*) Anon. MS. 15th January 1804.

(*u*) Anon. MS. 1805; and see on this subject, ex parte Mills, 3 Ves. &

Bea. 139, and ex parte De Tastet, 1 Ves. & Bea. 280. Ex parte Smith, *ib.* 518.

(*x*) See on this subject, ex parte Goring, 1 Ves. jun. 169. S. C. noticed 1 Cooke's B. L. 276. Greeg's edit.

(*y*) See ex parte Hughes, 6 Ves. 622.

Chancellor does not give directions about the mode of selling the Estate, as in Sales before a Master; but that is left to the Commissioners, who will sell in the manner they think most advantageous. (z).

In a former part of this Work (b) some observations have been made as to the Title which Assignees are bound to give on a Sale by them.

By the 49 Geo. 3, c. 121, s. 5, particular directions are given respecting the Examination by the Commissioners of the Assignees, previous to declaring a Dividend; and by the same Act, the Commissioners are directed to Charge Assignees with Interest at the rate *of Twenty per Cent. for all Sums, [*683 part of the Bankrupt's Estate, wilfully retained, or employed by them for their own benefit. Preceding Cases, therefore, on this subject, it is not necessary to notice; and by the same Statute (c) it is also provided, that the Certificate of any Assignee becoming Bankrupt, being indebted to the Estate of the Bankrupt of which he was an Assignee, in 100*l.* or upwards, in respect of Moneys received by him as Assignee, and wilfully retained or employed by him for his own benefit, shall only discharge his Person, and his future Effects shall remain liable for so much of such Debt as shall not be paid by Dividends, with lawful Interest (d).

By the same Act it is provided, that no Action shall be brought for a Dividend against the Assignees, as might previously have been done (e); but authority is given to the Chancellor, upon Petition, to order the Assignees to pay the same, with Interest (f).

The Assignees, it seems, in consequence of their Covenant with the Commissioners, are bound to exonerate them from the expense occasioned by an Action for false Imprisonment brought against them by the Bankrupt, in which he was non-suited (g).

If a Person in whose hands the Bankrupt's Books are, refuses to produce them before the Commissioners, they may commit him (h).

*Though the Bankrupt has passed his examination, and [*684 obtained his Certificate, the Chancellor has authority to enforce the Commissioners' order for the attendance of the Bankrupt (i).

(z) Ex parte Coming, 1 Ves. jun. 42.

(b) See ante, 1 vol. p. 433.

(c) Sec. 6.

(d) See ex parte Atkinson, 3 Ves. & Bea. 14.

(e) See Browne v. Bullen, Dougl. 392. Injunctions, however, have been granted in such cases. See Assignees of Gardiner v. Shannon, 2 Sch. & Lefr. 228; but see Mr.

Christian's observations in support of Browne v. Bullen, 1 vol. Bank. Law, p. 316; and see Clarke v. Capson, 2 Ves. jun. 668.

(f) Sec. 12.

(g) Linthwaite, ex parte, 10 Ves, 234.

(h) Ex parte Keith, 2 Bro. C. C. 600.

(i) Anon. 15 Ves. 449.

By the 5 Geo. 2, c. 30, it is provided, that no *Suit in Equity* shall be commenced, nor any disputes submitted to Arbitration, nor any Commission made, by any Assignee or Assignees, without the consent of the major part in value of the Creditors of such Bankrupt, who shall be present at a Meeting of the Creditors pursuant to Notice to be given in the *London Gazette* for that purpose; and Creditors cannot give a *general power* to Assignees to prosecute Suits, or submit matters to arbitration, at their own discretion, but there must be a *Meeting* of Creditors, upon a Notice given in the *London Gazette*, to consider of each particular Suit, or Case for Arbitration (*k*), or Composition (*l*), and the majority in value who are present bind those who are absent (*m*). If Assignees sue out a Commission against a Person who is, perhaps, a *Crown Debtor*, without the consent of Creditors, that cannot be the subject of complaint, expedition being so very important in such a Case (*n*).

Assignees may bring *Actions at Law* without previously convening the Creditors (*o*); and, it seems, that though Assignees cannot file a Bill without the consent of the Creditors, yet that 685*] a Creditor may file *a Bill at the peril of being himself obliged to pay the Costs (*p*).

If a Suit be instituted by Assignees on behalf of a Bankrupt, and the Creditors are not interested in the object of the Suit, their assent to it is not necessary (*q*).

One of two or more Assignees of a Bankrupt may sue in Equity without the others joining in the Suit (*r*).

If a Solicitor carries on Suits for an Assignee without the authority of the majority in value of the Creditors, the Estate of the Bankrupt is not liable to his Bill for such Suits (*s*).

Assignees under a Commission of Bankruptcy cannot purchase for their own benefit either any part of the Estate of the Bankrupt, or a Creditor's right to the Dividends (*u*); and where the Assignee had so purchased the Bankrupt's Estate, he was, on that ground, removed (*x*).

Nor is a Commissioner, or Solicitor under the Commission, permitted to purchase either on his own or another's account (*y*).

The Assignees must make a Dividend after four Months, and within twelve, from the issuing of the Commission, and give twenty-one Days previous notice in the Gazette (*z*). A second Dividend must be made within eighteen Months, and such Div-

(*k*) Ex parte *Whitchurch*, 1 Atk. 90.

(*l*) *Cooper v. Pepys*, 1 Atk. 106. *Warner v. Watkins*, 2 Atk. 7.

(*m*) Ibid.

(*n*) Anon. MS.

(*o*) *Cooke's B.L.* 279, 6th edition.

(*p*) *Franklin v. Fenn*, Barn. 30.

(*q*) *Wilkins v. Fry*, 1 Meriv. 244.

(*r*) Ibid.

(*s*) Ex parte *Whitchurch* and others, 1 Atk. 210.

(*u*) Vid. *Regulations in Bankruptcy* 6 Ves. 5. See ante, 1 vol. p. 110.

(*x*) Ex parte *Reynolds*, 5 Ves. 707.

(*y*) Ex parte *Bennet*, 10 Ves. 381. See ante, 1 vol. p. 110.

(*z*) 5 Geo. 2, c. 30, s. 33.

idend *is final, unless there are future Effects, in which [*686 case a Dividend must be made within two Months (y).

If the Dividend is not made at the period pointed out by the Act of Parliament, (and owing to the complication of commercial affairs, in great Bankruptcies, it seldom is,) the Commissioners must give notice, in the Gazette of a Time and Place for the Assignee or Assignees to attend, and show cause why a Dividend has not been made; and if no satisfactory reason is given, the Commissioners may appoint a Time and Place when and where they will meet to make such Dividend(z).

The Chancellor, it seems, has a discretion for the general benefit of the Creditors, and having the right to take order for the distribution of the Property, may make such order as to the time or making of a Dividend, as shall appear to be for the general benefit of the Creditors (a), taking care, however, not to interpose delay, unless satisfied that those who apply have a right to call for it, and that finally it will be beneficial to them and the general Creditors (b).

If a Creditor prove under the Commission a Debt upon a Bill of Exchange, and another Debt by simple Contract, and afterwards receive twenty Shillings in the Pound on the Bill of Exchange from the Parties liable thereon, he cannot take a Dividend on the whole Sum proved (although it should not amount to twenty Shillings on the simple Contract Debt,) but *can only receive a Dividend in respect of that Debt (c). [*687

If a Creditor has improperly obtained possession of any of the Bankrupt's Property, his Share of the Dividend may be retained unless he gives up such Property (d); but an Assignee, it has been held, cannot stop a Person's Share in a Dividend on account of his own private Debt, owing to him from that Person (e).

Assignees are not justified in delaying the Payment of Dividends on the ground that notice has been given them by a third Person of a claim upon the Dividends, no Petition having been presented by such Claimant within a reasonable period after such Notice of claim (f).

If an Attorney has received Dividends on behalf of a Creditor, and has not paid them over, the Chancellor will on Motion, order the Attorney to pay the Money within a given time (g).

Where the Banker appointed under a Commission of Bankruptcy became Bankrupt, his estate was held not to be entitled

(y) 5 Geo. 2, c. 30, s. 37.

(z) Vide Order 8th March, 1794. 4 Bro. C. C. 546.

(a) Ex parte Kendall, 17 Ves. 522, 524. S. C. 1 Rose, 71.

(b) 17 Ves. 525.

(c) Ex parte Woodman, 1 Cox, 201.

(d) Ex parte Smith, 3 Bro. 46.

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(e) Ex parte White, 1 Atk. 90;

but see contra ex parte Nockold, Cooke's Bankrupt Law, 1st. vol. 545. edit. 6th, a preferable decision, as observed 1 Christn. Bankt. Law, 317.

(f) Ex parte Ashop, 1 Madd. Rep. 603.

(g) In the matter of Johnson, MS. 1805.

to any Dividend on a Debt proved by him against the other, until full reimbursement of all Property of that Estate beyond the amount of his Dividend (h).

688*] Where an Assignee dies before he has accounted *for what he has received, and leaves no personal Assets, the Creditors, in respect of his Covenant, have a Lien upon his real Estate (i).

Where an Assignee under a Commission of Bankruptcy died very much indebted by Bond &c. and the Creditors of the Bankrupt petitioned that the Administrator of the Assignee might account before the Commissioners, he having some of the Bankrupt's Effects, *in specie*, in his hands, but the administrator denied this upon oath, and swore that there were Debts by speciality beyond the Assets; the Court thought this a proper case for a Bill, and not for a summary way of accounting before Commissioners (k).

Part of the Bankrupt's Estate having been paid into a Bank, in the Names of *three* Assignees, one of whom had subsequently absconded, an Order was, on Petition, made on the Bank to pay the Money to the two other Assignees (l).

If all the Assignees die, and the heir at Law of the Survivor, is an Infant, the Chancellor has authority under the 5 Geo. 2, c. 30, s. 31, to order new Assignees to be chosen, and a new Bargain and Sale, and Assignment, the former being vacated, so far as relates to Property undisposed of (m).

If an Assignee under a Commission of Bankruptcy employs an Agent to receive money, and he embezzles it, the Assignee will be liable to make it good to the Creditors, unless he consulted 689*] the body of the *Creditors in the appointment of the Agent (n). But when Assignees employ an Agent either from necessity, or conformably to the common usage of mankind, they have not been held liable, provided they have used due precaution in the choice of the Person employed (o).

The negligence or misconduct of one Assignee, will not affect a Co-Assignee (p).

The Court can act in a summary way under a Commission of Bankruptcy, in transactions between Creditors and Assignees; but cannot, on Petition, adjust any demands that one Assignee may set up against another, concerning a private agreement between themselves, independent of the rest of the Creditors (q).

(h) Graham, ex parte 3 Ves. & Bea. 130. Ex parte Bebb, 19 Ves. 222.

(i) Primrose v. Bromley, 1 Atk. 89.

(k) See ex parte Markland, 2 P. Wms. 546.

(l) Ex parte Hunter, 1 Meriv. 408. Ex parte Collins, 2 Cox, p. 427.

(m) Ex parte Bainbridge, 6 Ves. 451.

(n) In the matter of the Earl of Litchfield, &c. 1 Atk. 88.

(o) Ex parte Belchier, Amb. 218.

(p) See Earl of Litchfield, &c. 1 Atk. 88. Primrose v. Bromley, 1 Atk. 89.

(q) In the matter of the Earl of Litchfield, 1 Atk. 88.

The Court will not permit an Assignee to be removed as upon his own consent: he must be removed by the act of the Court (r).

If a Person chosen as Assignee be permanently resident out of the jurisdiction of the Court, (in Scotland, for instance,) he may be removed (s). So if he be, *Insolvent* (t), or becomes *Bankrupt*; and in the latter case the Bankrupt and his Assignees must join in the Assignment to a new Assignee (u). Where an Assignee *absconds* (x), or from other circumstances he cannot *execute an Assignment to the new Assignee, the [*690 Chancellor has directed the first Assignment and Bargain and Sale to be vacated, except as to any Sales that had been made of the Bankrupt's real Estate, and a new Assignment and Bargain and Sale should be made from the Commissioners to such new Assignee (y).

An Assignee will not be removed merely because he must account, unless there is something in the nature of his interest rendering it impossible to take the account with due impartiality and justice; or a degree of misconduct in the Assignee, making him unfit to execute such a Trust (z).

Certificate.

An Agreement in writing by all the Bankrupt's Creditors to discharge him, would, it has been held, be sufficient, and equal to a Certificate (a).

In order to give effect to the Certificate, the consent of a proportion of the *Creditors* must be first obtained, and then the consent of the *Commissioners*, and lastly the consent of the *Chancellor*.

And first, with respect to the *Signature of the Creditors*. Unless a Person proves a Debt, or shows a reasonable ground for a Claim, he cannot sign the Certificate (b). It is necessary that *three fifths* (c) of *the Creditors, in number and value, [*691 whose debts amount to Twenty Pounds, should sign. If there is a fraction, one, for that fraction, must sign (d). The Signature of the Creditors is a voluntary act, and uncontrollable (e). Applications have been made to Parliament to renew

(r) Vid. Regulations in Bankruptcy, 6 Ves. 4.

(s) Ex parte Grey, 13 Ves. 274.

(t) Vid. ex parte Griegner, 1 Atk. 91.

(u) Ex parte Newton, 1 Atk. 97.

(x) Ex parte Higgins, 1 Ball and Bea. 218.

(y) Ex parte Leman, and ex parte Cooke, 13 Ves. 217; but the orders in those cases were never drawn up. *Quære*, therefore as to the effect of vacating the Bargain and Sale. See

Ex parte Harris, 3 Madd. Rep. 473. See ex parte Higgins, 1 Ball & Bea. 218.

(z) Ex parte Surtees, 12 Ves. 14.

(a) Troughton v. Githey, Ambli. 633.

(b) 1 Atk. 83.

(c) 49 Geo. III, c. 121, s. 13.

(d) 1 Christ. Bank. Law, 154.

(e) Robson v. Calz, Dougl. 216. Ex parte King, 7 East, 92. Ex parte King, 10 Ves. 417. 13 Ves. 181. Ex parte Bagley, 17 Ves. 118.

the provisions of an Act that formerly existed, vesting in the Lord Chancellor the power to give the Bankrupt his Certificate where the Creditors have refused their consent ; but upon great and repeated consideration, the conclusion was, that such a discretion should not be intrusted to the Great Seal (*f*).

Precipitancy in the signing of Certificates is discouraged (*g*), and it seems doubtful whether a Signature, previous to the last Examination is effectual (*h*), though this may operate harshly upon the Bankrupt ; for when a final Dividend is made the Commissioners may divide the whole, and are not bound to make any reservation in respect to the Bankrupt's Allowance, unless he has obtained his Certificate (*i*).

In pursuance of a General Order (*k*), the Creditors when they sign a Certificate must at the same time write opposite their Names, the Day of the Month and Year on which they so sign the same ; and their Signature must be attested in writing upon the Certificate by the Solicitor to the Commission, or some 692*] Clerk of the Solicitor, or by the Messenger to the *Commission, or by some Clerk of the Commissioners ; and in all Affidavits exhibited to the Commissioners, in order to prove the Signature and Superscription of the consent of the Creditors to the Commissioners signing and sealing the Certificate of the Bankrupt, the Day of the Month and Year in which the respective Creditors signed and subscribed such consent must be distinctly stated. To prevent fraud on the Commissioners, a List is to be made and kept by them, or one of them, of all Creditors above Twenty Pounds who prove their Debts, and of the Amount of their respective Debts, which List, as the same shall from time to time be made up, is to be signed by three of the Commissioners.

Creditors may, by a special Power of Attorney for that purpose, (a general Power is insufficient) (*l*), authorize a third Person to sign the Certificate (*m*).

A Creditor who proves different Debts in different rights can only sign once : as, if he proves a Debt due to himself, and also proves a Debt as an Executor, a Trustee, or Guardian (*n*).

Where there are several Executors, one Executor may sign the Certificate ; but it seems, a Trustee cannot, or rather ought not, to sign, without the consent of his *Cestui que Trust* ; and where the *Cestui que Trust* is an Infant, and therefore cannot consent, it is a hazardous step (*o*). If there be more than one Trustee, all the Trustees must sign, unless they have authorized one of the Trustees to sign (*p*).

(*f*) 17 Ves. 118.

(*g*) Anon. 1 Atk. 84.

(*h*) Ex parte King, 11 Ves. 424 ; 598.

and see 1 Atk. 84. 2 Rose. 176.

(*i*) Groome v. Potts, 6 T. R. 548.

As to the Allowance, see post.

(*k*) See Lord Eldon's Order; 8th August, 1809, 16 Ves. 318.

(*l*) Anon. MS.

(*m*) See ex parte Mitchell, 14 Ves.

(*n*) Ex parte Saumarez, 1 Atk. 84.

(*o*) Powel v. Evans, 5 Ves. 839.

(*p*) Ex parte Rigby, 19 Ves. 463.

*A Bankrupt's Certificate does not require a Stamp until it has been allowed, and therefore an alteration in it, after it had been stamped, and before allowance, was not considered as an available objection (*p*).

One Partner may on behalf of himself and his other Partners sign the Certificate, or authorize a third Person, by a Power of Attorney, to sign the same (*q*); and though the Partnership is dissolved, yet the Signature of one Partner is binding (*r*).

With respect to the *Signature of the Commissioners*, it has been held that they have a judicial discretion given to them by Act of Parliament, and no Court of Justice has power to compel them to certify (*s*) that the Bankrupt has in all things conformed himself according to the directions of the Act, and that there does not appear to them any reason to doubt of the truth of his discovery, or that it is a full discovery, as they must do, before the Person or Persons holding the Great Seal can enter into any consideration of the subject (*t*). But though Certificates are matters of Judgment, yet it ought not to be arbitrary either in the Commissioners or the Chancellor to say, "we will or we will not allow a Certificate;" but they ought to be governed entirely by fairness, or fraudulent conduct in the Bankrupt (*u*).

*The Commissioners have no duty but to see that the [*694 Bankrupt has conformed to the Statutes; and that duty is confined to his conduct *since he became Bankrupt* (*x*).

After the Creditors and Commissioners have signed the Certificate, it is laid before the *Chancellor, for his Allowance*, and he, formerly, referred it to the *Judges* (*y*). The Chancellor, in his discretion, may either allow the Certificate, or send it back to the Commissioners; and for the purpose, among others, of permitting other Creditors, who, living at a distance, might not have had an opportunity to prove, and express their Assent or Dissent to the Certificate. When the Certificate is so sent back, the Commissioners are not confined to that object, nor bound by their original Certificate; but upon the whole it is opened to their discretion, whether or not they will again certify, which, as before observed, they must do before the Bankrupt can complete his Certificate (*z*). But it seems, that the Chancellor can require the Commissioners to review their Cer-

(*p*) Ex parte Sawyer, 1 Rose, 141.
(*q*) Ex parte Mitchell, 14 Ves.
697. S. C. MS.

(*r*) Ex parte Hall, 17 Ves. 62.

(*s*) Ex parte Williamson, 1 Atk.

82. Ex parte King, 15 Ves. 128;

and see ex parte Bangley, 17 Ves.

118. In a case of manifest oppres-

sion, Parliament would, probably re-

lieve. In ex parte Williamson, Lord

Hardwicke seems to have doubted

whether a mandamus would lie; but
it has been determined, it will not. 7
East, 92.

(*t*) Ex parte Bangley, 17 Ves. 118.

(*u*) Ex parte Williamson, 1 Atk.

82.

(*z*) Ex parte Gardener, 18 Ves. 45.

48.

(*y*) 1 Atk. 87.

(*x*) 15 Ves. 128.

tificates, as to that part which relates to the point whether the *Discovery* is full or not (a); but if the Chancellor is dissatisfied on that subject, he will it seems, examine the Bankrupt *visa voce* (b).

A Certificate allowed in the life-time of the Bankrupt, though not confirmed by the Lord Chancellor till after the Bankrupt's death, has been determined by *Lord Hardwicke* to be good, and 695*] that the *operative force of it arises from the consent of the Creditors, and when so confirmed it has its effect from the beginning (c); but this latter proposition seems to be erroneous, and in subsequent cases it has been clearly held, that Property coming to the Bankrupt after the Signature of the Certificate by the Creditors and the Commissioners, but before the allowance of the same by the Chancellor, belongs to the Creditors (d); so that the operation of the Certificate is clearly from such *Allowance* of the same.

After the Signature of the Creditors and Commissioners, the Certificate is left in the Bankrupt's Office for three weeks, together with an Affidavit of the Bankrupt, that he obtained his Certificate without fraud; and notice of the same is given in the Gazette, before the Chancellor acts upon it, a period adopted, to enable Creditors to oppose it, if they have grounds for so doing.

A Petition to stay a Certificate in order to give a Creditor an opportunity of proving his Debt will not avail unless he accounts for not having applied before (e).

Nor will a Bankrupt's Certificate be stayed in order that an Account may be taken of what is due to the Petitioner (f); or to give a Person insisting on a right to stop *in transitu* an opportunity of proving, in case he should fail in his Action (g).

696*] *If Creditors live abroad, and the Certificate is signed before they had time to prove, it is a good ground for a Petition to stay the Certificate (a).

The Certificate of a Bankrupt having been stayed upon the Petition of a Claimant under the Commission, who suggested fraud and collusion between the Bankrupt and his Son, there was a Meeting of Commissioners to examine into the matter, and at this Meeting several new Creditors came in and proved; but as they did not join in a Petition to set aside the Commission as fraudulently obtained, the Court would not delay the allowance of the Certificate, but left the Claimant to file a Bill if he thought proper (b).

By a General Order, very strictly adhered to, Affidavits to

(a) *Ex parte Bangley*, 17 Ves. 119. 48. *Ex parte Birch*, 1 Madd. Rep. 600.

(b) *Ibid.* 118.

(c) *Bromley v. Goodere*, 1 Atk. 77.

(d) *Tudway v. Bourne*, 2 Burr. 718. *Webb v. Word*, 7 T. R. 296.

(e) *Ex parte Adams*, 2 Bro. C. C.

(f) *Ex parte Johnson*, 1 Atk. 81.

(g) *Ex parte, Heath*, 6 Ves. 613.

(a) *Ex parte Saumarez*, 1 Atk. 84.

(b) *Ex parte Fydell*, 1 Atk. 73.

be made use of at the hearing of any Petition to stay a Bankrupt's Certificate must be brought into the Office, *together with the Petition* (c). But such Affidavits as are necessary to be made in reply to any Affidavits made in answer to such Petition, may be filed afterwards (d).

If the Bankrupt is not served with a Petition to stay his Certificate (e), or not till the day of Petitions, though the Petition was not answered till the day before, he is entitled to his Certificate (f), for the Creditor ought to have petitioned sooner.

*A Motion was made on Saturday the 11th, the last day [*697 for presenting a Petition against a Bankrupt's Certificate, that a Petition prepared, but not properly signed, might be ordered to be received on Monday the 13th, and considered as presented on the 11th, but it was refused (g).

It is a general Rule, that where a Petition to stay a Certificate fails, the Petitioner pays the Costs; unless in the transaction there is some misconduct on the part of the Bankrupt (h).

If the Bankrupt has permitted a fictitious Debt to be proved, knowing it, he is not entitled to his Certificate; as not having made that full disclosure which justifies the Commissioners in giving the Certificate required by the Act 5 Geo. 2, c. 30, s. 10. (i).

The Clause in the 5 Geo. 2 (k), in which a Bankrupt is excepted from the benefit of the Act, who hath upon the marriage of any of his children given above the value of 100*l.* unless he hath at the time sufficient to satisfy all his Creditors, being a penal clause, is construed *strictly*, and has been held not to apply as to Money given to a *Niece* (l).

The same Statute also provides that where a Man loses 5*l.* in gaming, in the course of the day his Certificate shall be void, and if this appears clear to the Chancellor he will not grant a Certificate; but if there be contradictory Affidavits, and the fact cannot be *ascertained, the Chancellor will grant the Certificate, and the Creditor will be left to avoid it, if he can, at Law, or to indict for perjury (m).

Where it appeared in the last Examination of the Bankrupt that he had lost more than 5*l.* at play at one time, a Petition was presented by the Bankrupt to expunge that part of the last Examination, and the Creditor, at whose instance the question

(c) Vid. Order, 16 November, 1805.

(d) 11 Ves. 542. Ex parte the Royal Bank of Scotland, 1 Ves. & Bea. 5.

(e) Ex parte Kendall, 1 Ves. & Bea. 543.

(f) Ex parte Bunchley, Coop. 97.

(g) Ex parte Emmett, 1 Madd. Rep. 111.

(h) Ex parte Royal Bank of Scot-

land, 1 Ves. & Bea. 7. Ex parte Gardener, 1 Ves. & Bea. 45.

(i) See 24 Geo. 2, c. 57, s. 9; and see 3 Esp. N. P. 264. Freydeberg's Case, 3 Ves. & Bea. 142. Ex parte Shirley, 2 Rose, 71.

(k) See Ch. 40, s. 12.

(l) Ex parte John de Saumarez, 1 Atk. 86.

(m) Ex parte Kennett, 1 Ves. & Beames, 194.

was put, consented ; but the Lord Chancellor immediately dismissed the Petition (*n*).

Insuring in the Lottery has been holden not to be "a pastime or game" within the Statute (*o*).

Any Creditor, though his Debt be under 20*l*. will be heard against the allowance of a Certificate, by showing Fraud, or other ground (*p*) ; and Creditors who have signed the Certificate, if since the signing of it they have gained a knowledge of its being unfairly obtained, may oppose it (*q*).

After a Certificate is allowed, a person not a Creditor under the Commission cannot present a Petition with a view to obtain discoveries to defeat the Certificate ; but should file a Bill of Discovery ; a Petition, therefore, for a general inspection of a Bankrupt's books, for the purpose of getting rid of the Certificate, by proving gambling transactions, was refused (*r*).

699*] It is very hard, but it is settled, that if a friend or *foe of the Bankrupt, gives Money, as an Inducement to sign the Certificate, though the Bankrupt was in no degree privy to the transaction, and would never have consented to it, the Certificate is void (*s*) : but the Chancellor will allow him to get another (*t*). If the Creditors know that Money is given to sign the Certificate, still, it seems, it is bad (*u*).

If a Creditor agrees privately with the Bankrupt to sign his Certificate, upon his promise or contract to pay the Creditor's whole Debt, such contract is void by the Statute (5 Geo. 2, c. 30, s. 11.) (*x*) ; and Money paid to a Creditor to induce him to sign a Certificate may be recovered back (*y*).

The effect of the Certificate is to discharge the Bankrupt from all Debts, whether joint or separate, legal or equitable, which might have been proved under the Commission (*z*), and from some Debts which could not have been proved ; as, where an action is brought against a Bankrupt in respect of a Debt proveable under the Commission, and a verdict is obtained after the Commission, the Costs of such Action, though not proveable under the Commission, are barred by the Certificate (*a*).

A Certificate under a second Commission does not protect 700*] the future effects of the Bankrupt from a *claim by his

(*n*) Ex parte Bartoft, 2 Cox, p. 49.

(*o*) Lewis v. Piercy, 1 H. Black.
29.

(*p*) Ex parte Allen, 17 Vin. 134,
cited 1 Christian's B. L. 154.

(*q*) Tudway v. Bourne, 2 Burr.
716.

(*r*) Ex parte Mawson, 6 Ves. 614.
see ex parte Fyddell, 1 Atk. 73.

(*s*) Ex parte Butt. 10 Ves. 359, S.
C. MS. and ex parte Hall, 17 Ves.
62.

(*t*) Ex parte Butt, MS.

(*u*) Ibid.

(*x*) Sparet v. Spiller, 1 Atk. 105.
The Case Lewis v. Chase, 1 P. Wms.
620, has not been followed. See
Sumner v. Brady, 1 H. Black, 647.

(*y*) Ex parte Sadler, 15 Ves. 52.
Fieze v. Randall, 6 T. R. 146.

(*z*) Horsey's Case, 3 P. Wms. 24.
(*a*) See ex parte Hill, 11 Ves. 646 ;
and ex parte Charles, 16 Ves. 256.

S. C. 14 East, 197. Brind v. Bacon,
5 Taunt. 163.

Creditors, though it does from a claim by his *Assignees* (b). Such future effects, unless he pays fifteen shillings in the pound under such Commission, are liable in *Judgment*, but the Assignees cannot take possession of them under the Commission (c); and the law is the same though the first Commission was superseded (d); and by the 49 Geo. 3, c. 121, s. 6, if Assignees become Bankrupt, having 100*l.* of the Bankrupt's estate in their hands, their future effects are liable to the payment of the same.

By the 5 Geo. 2. c. 30, s. 7, if a Bankrupt, after he has obtained his Certificate, is arrested for any Debt *due before he became a Bankrupt*, he will be discharged upon common bail, and may plead his Bankruptcy, and a verdict will pass for the Defendant, unless the Plaintiff proves the certificate was obtained unfairly, or by fraud, or any concealment to the value of 10*l.*; and if a verdict passes for the Defendant, or the Plaintiff shall be nonsuited, or judgment given against him, the Defendant will recover his full Costs.

It has been held, however, that if there is any appearance of fraud on the part of the Bankrupt, or it appears that the Certificate is seriously meant to be disputed, the Court will not interfere in a summary way (e).

By Section 13 of the same Act it is provided, that if any Bankrupt who shall have obtained his or her *Certificate shall [*701 be taken in Execution, or detained in Prison on account of any *Debts due or owing before he or she became Bankrupt*, by reason that Judgment was obtained before such Certificate was allowed and confirmed, it shall and may be lawful for any one or more of the Judges of the Court wherein Judgment has been so obtained against such Bankrupt, on production of his Certificate, to order his discharge.

It may be doubted whether this Act authorizes a discharge from Actions or Executions in respect of Debts rendered proveable, notwithstanding a prior act of Bankruptcy, by the 45 Geo. 3. c. 135, and the 49 Geo. 3, c. 121, there being no provision to that effect in those Statutes, and not being Debts owing *before the Party became Bankrupt*, as required by the 5 Geo. 2, c. 30, s. 7 & 13.

The Crown is not bound by a Certificate (a).

Where there is a joint Certificate, if one Partner dies before the allowance, the Certificate is good as to the Survivor (b).

A Certificate does not bar contingent Debts, where the con-

(b) *Ex parte Hodgkinson*, Coop. 101.

(c) S. C. 19 Ves. 294.

(d) *Thornton v. Dallas*, Dougl. 46.
Everett v. Backhouse, 10 Ves. 94.
Ex parte Leaverland, 1 Atk. 146, cited 1 Christian's B. L. 146.

(e) 1 Cooke's Bankrupt Law, 536, Edit. 6, and the authorities there cited.

(a) *Anon* 1. Atk. 262.

(b) *Ex parte Cume*, 10 Ves. 51.

tingency upon which the Debt was payable did not happen in time to enable the Party to prove his Debt (c).

Formerly, if there was a Bond to secure an Annuity, and also a Covenant, though the Bond was forfeited before the Bankruptcy, and therefore the Certificate was a bar to that, it did not bar the Action for breaches of Covenant subsequent to the Bankruptcy (d); but now, by the 49 Geo. 3. c. 121, s. 17, 702*] *Creditors are admitted to prove the value of the Annuity, and the Bankrupt is discharged by his Certificate from all future claims. So, by the Statute, sec. 19, Bankrupts who deliver up, Leases, or Agreements for Leases, to the Assignees, are exempted from all future liability in respect of Rents and Covenants.

But the Bankruptcy and Certificate of one of several joint Grantors of an Annuity, and Covenantors for payment, only discharges the Bankrupt, and not his Co-Grantors (e). The Act has been considered as defective in making no distinction between Principal and Surety, and that it introduces an almost insuperable objection to giving it effect in a Court of Law, in any Case of *joint Grants of Annuities* (f).

A Cognovit is not discharged by Bankruptcy and a Certificate, if Judgment be entered up after the Certificate (g).

So, where an Action arises *ex delicto* before the Bankruptcy, the Party is not obliged to go before the Commissioners to receive a satisfaction, but may bring an Action, to which the Bankrupt's Certificate is not a bar (h).

The allowance of a Bankrupt's Certificate does not discharge his Sureties (i).

Where a Person discharged by the Insolvent Debtors Act becomes a Bankrupt afterwards, his Certificate must be special, and will be allowed only as a discharge of his Person, but not of his future Estate and Effects (k).

703*] *If the Certificate, though allowed, be obtained by fraud, it will be recalled; as, where the Commission was sued out, by concert, for the purpose of obtaining a Certificate (l). Such a combination was considered by Lord Eldon "as a most illegal, wicked conspiracy," and a proper subject for an Indictment or Information; and whenever, the circumstances called for it, he should uniformly refer them to the consideration of the Attorney-General (m).

Bankrupt's Allowance.

By the 5 Geo. 2, c. 30, s. 7, it is enacted, that if the Credit-

(c) 1 Atk. 119, 120.

(d) Ex parte Granger, 10 Ves. 351.

(e) Baxter v. Nicholls 4 Taunt. 90.

(f) See *ibid.* 92, 93.

(g) Wybourne v. Ross, 2 Taunt. 68.

(h) Hammond v. Toulmin, 7 T. R.

(i) Ex parte Williamson, 1 Atk. 84.

(k) Ex parte Green, 1 Atk. 257.

(l) Ex parte Cawthorne, 19 Ves. 260.

(m) *Ibid.*

ors are paid a Dividend of ten Shillings in the Pound, the Bankrupt shall be allowed 5 per Cent. out of the net produce of his Estate, so as the same does not exceed 200*l.*; if the Estate pays twelve Shillings and Sixpence in the Pound, he is allowed seven and a half per Cent. so as the same does not exceed 250*l.*; and if the Estate pays fifteen Shillings in the Pound, he is allowed ten per Cent. so as the same does not exceed 300*l.*

A Bankrupt is not entitled to his *allowance* until a *final Dividend* is made (*n*), nor then, unless he has obtained his Certificate (*o*). The allowance is a *vested* Interest, and passes to the Bankrupt's Representatives (*p*); and though an allowance has been promptly ordered, the Bankrupt is not bound to refund (*q*).

*Where Partners are Bankrupts, and pay different [*704 proportions toward the Debts, they have but one allowance, which are divided between them in the proportions their respective Estates have paid (*r*).

Upon a *second Bankruptcy*, no allowance is made to the Bankrupt if the Estate does not pay fifteen Shillings in the Pound (*s*).

The allowance is preferred before Interest to the Creditors on their Debts, which is paid only in the event of a Surplus (*t*).

The Assignees under a second Commission have a right to the Bankrupt's allowance under the first Commission (*u*).

The payment of Dividends to the amount of eighteen Shillings in the Pound to be joint Creditors under a separate Commission, and a payment only of two Shillings in the Pound to the separate Creditors, does not entitle the Bankrupt to an Allowance (*x*).

A Bankrupt under a joint Commission is not entitled to an allowance, though the joint Estate pays ten Shillings in the Pound, unless both the joint and separate Creditors, who have proved, are paid ten Shillings in the Pound. If one Partner only has obtained his Certificate, no allowance is given to the Partner who has obtained his Certificate, the allowance being only jointly claimed (*y*).

(*n*) *Ex parte Stiles*, &c. 1 Atk. 208; but see Mr. Christian's observations on that Case, 1 Bank. Law, p. 137.

(*o*) *Ex parte Grier*, 1 Atk. 207. *Groome v. Potts*, 6 T. R. 548.

(*p*) *Ex parte Trap*, 1 Atk. 208. *Ex parte Calcott*, 1 Atk. 209, S. C. 3 Atk. 314.

(*q*) *Russell v. Russell*, 1 Bro. 269.

(*r*) *Ex parte Bate*, 1 Bro. C. C.

452; but see Mr. Christian's remarks on this Case, 1 Bank. Law, 139.

(*s*) *Ex parte Gregg*, 6 Ves. 238.

(*t*) *Ex parte Morris*, 3 Bro. C. C. 79.

(*u*) *Ex parte Miller*, 2 Cox, 213.

(*x*) *Farlow ex parte*, 2 Ves. & Bea. S. C. 1 Rose, 421.

(*y*) *Ex parte Powell*, 1 Madd. Rep.

68.

705*]

*Surplus.

UNDER a Commission, all Debts which carry Interest have the same computed on them only to the date of the Commission; but it has repeatedly been held, though it is difficult, Lord *Eldon* observes, to say on what ground the first decision proceeded (z), that if there be a *Surplus* after the payment to the Creditors of twenty Shillings in the Pound, the Creditors are entitled to Interest upon such Debts as either upon the face of the Security (a), or by force of the Contract, carry Interest (b), though such Interest had not accrued at the time of the Bankruptcy, nor for many years afterwards (c); but such as are Creditors by Bond are not to have Interest beyond their Penalties (d). Though a Bankrupt under a separate Commission pays his separate Creditors twenty Shillings in the Pound, he is not entitled to the Surplus against the claim of joint Creditors under the usual Order (e).

Where the joint and separate Creditors are paid twenty Shillings in the Pound, and there is a surplus of the separate Estate, the separate Creditors must first be paid Interest out of the separate Estate on their Debts, and then the joint Creditors 706*] may claim *Interest, but the separate Creditors must have the preference (f).

The Bankrupt is entitled to the remainder, after payment of the Interest; and pending the Commission he has a right to an inspection of the Proceedings (g); and upon a Petition, specifying palpable errors in the Accounts settled by the Commissioners, they will be rectified (h). The Bankrupt also, if his Assignees neglect to get in his Estate, may treat them as Trustees of the Surplus, and compel them by a Suit of Equity to get in all they can for his benefit (i). Interest out of a Surplus in Bankruptcy will be given to judgment-Creditors from the date of the Commission to the time when the principal Sums were paid, notwithstanding the Securities were at the time delivered up to the Assignees, with Receipts in full indorsed on them, the Creditors apprehending the Estates would not produce a Surplus, which proved to be a mistake (k).

(z) Ex parte Koch, 1 Ves. & Bea. p. 345.

(a) Ex parte Morris, 1 Ves. jun. 132. S. C. 3 Bro. C. C. 79; and see ex parte Mills, 2 Ves. jun. 303, and ex parte Reeve, 9 Ves. 590.

(b) Ex parte Champion, 3 Bro. C. C. 436. Ex parte Hankey, *ibid.* p. 504. See also ex parte Mills, 2 Ves. 302.

(c) Butcher v. Churchill, 14 Ves. 573.

(d) Bromley v. Goodere, 1 Atk. 75.

(e) Holmes, ex parte, 3 Ves. & Bea. 137. S. C. 2 Rose, 95. Ex parte Boardman, 1 Cox 275.

(f) Anon. MS. 29 June, 1804.

(g) Twogood, v. Swanston, 6 Ves. 485.

(h) *Ibid.* See 15 Ves. 8.

(i) Ex parte Donovan, 15 Ves. 8; but see what is said in Spragg v. Binkes, 5 Ves. 587.

(k) Ex parte Decy, 2 Ball & Bea. 77.

CHAP. III.

CHARITABLE USES.

Act for remedying Breaches of Trusts of Charities.

By the Statute of the 43 Eliz. c. 4, authority is given to the Chancellor or Lord Keeper, and to the Chancellor of the *Duchy of Lancaster*, respectively, to grant Commissions under their several Seals, to "inquire into any abuses of charitable [*707 Donations, and rectify the same by their Decree, which may be reviewed in the respective Courts of the several Chancellors, upon exceptions thereto; and an appeal lies from their Decision to the House of Lords (h). It was much debated whether a Bill of Review would lie after an Appeal to the Chancellor; but the Judges determined it would not (i).

We have before observed upon the Statute 52 Geo. 3, c. 101, in case of *Breaches of Trusts* created for charitable purposes (k). The facility given by that Act for remedying such Breaches of Trusts will probably supersede all applications for Commissions under the Great Seal to inquire into abuses of charitable Donations, which, indeed, even before this Act, were but seldom resorted to.

The construction of the Proviso in the 43 of Eliz. is, that where a College, Hospital or School (l), is founded, a special Visitor appointed, or a Visitor by operation of Law, the Commission by virtue of that Statute shall not interpose (m).

There must be a Will duly executed to create a charitable Use; and the Court will not set up a Trust for a Charity without a declaration in Writing; for *charitable Uses [*708 are within both of the Clauses of the Statute of Frauds and Perjuries; as well within the Clause of Devises as the Clause relating to the declaration of Trusts; and notwithstanding there are circumstances in a Will which showed the inclination of the Testator that some part of his Estate should go to charitable Uses, yet if the Evidence arising from thence is not certain enough to decree it to be a Trust for Charity, it will not be determined to be such; nor is parol Evidence admissible in such

(h) 3 Black. Com. 424. Warner v. North, Show. Parl. Cas. 110. Duke's Charitable Uses, p. 62, edit. 1676. The dictum in *Saul v. Wilson*, 2 Vern. 118, that no Appeal in these cases lies to the House of Lords, which seems adopted by Mr. Woodeson, vid. 1 Wood. Lect. 217, is incorrect.

(i) See *Windsor v. Hilton*, Cro. Car. 40. S. C. Wm Jones, 157, and the case of *Pridgeon*, Cro. Car. 351.

(k) See ante, p. 154.

(l) As to a School, see *Attorney-General v. Hewer*, 2 Vern. 388. *Attorney-General v. Newcombe*, 14 Ves. 7.

(m) *Attorney-General v. Governor of Harrow School*, 2 Ves. 552.

case to prove the Trust, since that would be breaking in upon the Statute (n).

The Founder of a Charity may give a *limited* visitatorial power, but though that be done, a Commission of charitable Uses may notwithstanding be issued. As, where the Founder, by his Statutes, gave the Ordinary of the place a power to interpret and determine doubts upon the Statutes and other powers, and to the Dean of York a power in certain cases, but no visitatorial power was given as the administration of the landed Property, it was held that a Commission of charitable Uses might issue (o).

It seems, too, that where Governors or Visitors are themselves Trustees, or are making a fraudulent use of such powers as they have as Visitors or Governors, a Commission may be issued, although in such case the Chancellor has a Jurisdiction over the subject, by way of *Information* (p).

709*] If the Heir of the Founder, Visitor of a Charity, *becomes Lunatic, the Chancellor, on Petition, acts as Visitor (q).

If a Commission be unduly issued, a Motion may, it seems, be made to quash the Commission (r). If the Chancellor is doubtful whether he has authority under the Act to issue a Commission, he may direct a Case for the opinion of a Court of Common Law, but such opinion is not binding upon him (s).

After a *Decree* by the Commissioners, exceptions to the same may be taken before the Chancellor; and even in that stage of the proceedings it may, it seems, be urged as ground of exception, that the Commission was invalid, and the Commissioners without authority to make such a *Decree* (t).

Notwithstanding a *Decree* under a Commission of charitable Uses, the Court of Chancery may still permit a Suit to be instituted, in which neither side is bound by what appeared before the Commissioners, but may set forth new matter (u).

Devises for charitable purposes, and charitable Legacies, have before been considered (x).

CHAP. IV.

CITY OF LONDON TYTHES.

By the 22 & 23 Car. g (y), it is provided, "that in case the Lord Mayor or Court of Aldermen shall refuse to execute any

(n) *Addington v. Cann & Andrews*, 3 Atk. 141.

(o) *Kirby v. Ravensworth Hospital*, 15 Ves. 305.

(p) *Ibid.* p. 314. Vid. ante, p. 155, &c.

(q) *Attorney-General v. Dixie*, 13 Ves. 519.

(r) *Kirkby v. Ravensworth Hospital*, 15 Ves. 308.

(s) *Ibid.* p. 313.

(t) See *Kirkby v. Ravensworth Hospital*, 15 Ves. p. 308.

(u) *Corporation of Burford v. Lenthall*, 2 Atk. 552.

(x) Ante, p. 60.

(y) Cap. 15. s. 12.

of the respective powers to them *by this Act granted, or [*710 to perform all and every such thing relating either to the assessing or levying of the respective Sums in the Act mentioned, that then it shall and may be lawful for the *Lord Chancellor* or *Lord Keeper* of the Great Seal for the time being, or any two or more of the Barons of his Majesty's Court of Exchequer, by Warrant under his or their respective Seals, to do and perform what the said Lord Mayor and Court of Aldermen, according to the true intent and meaning of this Act, might or ought to have done; and by such warrant either to empower any Person to make the respective Assessments, or to authorize the respective Officers appointed to collect the Sums aforesaid, to levy the same by Distress and Sale of the Goods of any Person that shall refuse to pay the same in manner and form aforesaid."

Some Cases relative to this Act were determined by *Lord Harcourt* (y); and in a Case upon the Act, it was held by *Lord Hardwicke*, that it does not extend to every Case under the Act, but only where there has been a *refusal* by the *Lord Mayor*, &c. to execute the powers granted to them; and he held in the Case before him, that the Court had Jurisdiction to inquire whether the *Lord Mayor* had done right in refusing his Warrant to levy Sums assessed on the Inhabitants, and if of opinion he had done wrong, to issue his Warrant for levying the Sums assessed, and his Lordship gave directions accordingly (z). His Lordship also held, "that in case any variance or difference in the Assessment between the Minister and the Parishioners, and Appeal to the *Lord Mayor*, the Court of Chancery or Exchequer have no Jurisdiction,* unless the *Lord Mayor* refuses [*711 to take cognizance, because that he would be refusing to execute their own power; but if they have entered into the consideration of the grievance in any manner, their Appeal would be final" (a).

After a determination by the Chancellor under this Act no Bill of Review lies (b).

CHAP. V.

HABEAS CORPUS ACT.

By the celebrated *Habeas Corpus* Act (c), "the most important barrier against tyranny, and best framed protection for the liberty of Individuals that has ever existed in any ancient or modern Commonwealth" (d), an authority is conferred upon

(y) Cited 3 Atk. 638.

(z) 3 Atk. 639. Gwillim's Tythe Cases, p. 811.

(a) 3 Atk. 639. Gwillim's Tythe Cases, p. 811.

(b) See Case of Pridgeon, Cro. Car. 351.

(c) 31 Chas. 2, c. 2.

(d) Fox's Historical Work, pp. 35, 6.

the Chancellor. He is thereby enabled to issue an *Habeas Corpus* to bring up Persons committed to prison ; and if bailable, is enabled to discharge the Party upon giving Security to appear and answer to the accusation in the proper Court of Judicature.

But although the Writ of *Habeas Corpus* is, unquestionably, demandable of right from the Lord Chancellor, yet it happens, in fact, that an application to him for that purpose is seldom made, except in Cases in his own Court for the ordinary purpose of Commitment, or of changing the Custody (e).

If a Bankrupt, who has been committed for not answering 712*] questions put by the Commissioners, sues out *a *Habeas Corpus* before the Chancellor, and it appears the Commitment was legal, the Chancellor has no authority to discharge him (f).

CHAP. VI.

ARBITRATION.

THE Court of Chancery, in regard to its *equitable* Jurisdiction, is not a Court of Record ; but so far as concerns its *Common Law* Jurisdiction, it is a Court of Record, and as such it is apprehended (for there does not appear to be any Decision on the point) that an application may be made to the Lord Chancellor, to make a Submission a Rule of Court ; unless it be so, the language of the second Section of the Act of the 9 & 10 Wm. 3, c. 15. would be unintelligible. The Act provides that all Merchants and others desiring to end any controversy (for which there is no remedy but by personal Action, or Suit in Equity) by Arbitration, may agree that their submission of the Suit to the Award or Umpirage of any Persons shall be made a Rule of his Majesty's Courts of Record, which the Parties shall choose, and may insert such their Agreement in their Submission, on condition of the Bond or Promise ; and upon producing an Affidavit of such Agreement, and upon reading and filing such Affidavit in the Court so chosen, the same may be entered on Record in such Court, and a Rule of Court shall thereupon be made that the Parties shall submit to, and finally be concluded by, such Arbitration or Umpirage ; and in case of disobedience thereto, the Party neglecting or refusing shall be subject to all the Penalties of contemning a Rule of Court, 713*] *and Process shall issue accordingly, which shall not be stopped or delayed by any Order, &c. of any other Court, either of Law or Equity, unless it appears on Oath that the Arbitrators or Umpire misbehaved themselves, and that such Award was corruptly or unduly obtained.

(e) Ex parte Oliver, 2 Ves. & Bea.
248.

(f) In re Nowlan, MS. 1805. S. C.
11 Ves. 511.

By Sect. 2, any Arbitration or Umpirage procured by corruption or undue means shall be void, and set aside by any Court of Law or Equity, so as such corruption or undue practice be complained of in the Court where the Rule is made for such Arbitration, before the last day of the next Term after such Arbitration made and published to the Parties.

Awards made on references in Causes depending, are not Awards to which the Statute relates (g).

A Motion may be made to the Chancellor to make a Submission to an Award a Rule of Court, as well after the Award is made, as before (h).

When an Award is to be made a rule of Court, the Submission that it shall be so, must be in Writing (i).

Where an Order was made by consent, referring all matters in difference in a cause to Arbitration, with liberty to any of the Parties to apply to the Court, as they should be advised, the Court, on Motion, refused to order the Arbitrators to proceed in the Arbitration, although they had accepted the reference (k).

*The grounds for setting aside an Award, are, first, that [*714 the Arbitrators have awarded what was out of their power; something, for instance, contrary to Law; secondly, Corruption, or that they have proceeded contrary to the principles of natural Justice, though there is no corruption; as, if they will not hear a Witness. Thirdly, that they have proceeded upon a mere mistake (l) which they themselves admit (m); otherwise, though the mistake be palpable, the Court, it seems, cannot relieve; but, perhaps, the Court would not enforce an Award by Attachment in case of an evident mistake (n); or illegality apparent on the face of the Award (o).

Where an Arbitrator received Evidence after notice to the Parties that he would receive no more, in which they acquiesced, the Award was set aside, though the Arbitrator swore that it had no weight with him (p); but if Arbitrators give reasonable notice to Persons to attend, and they do not, they may proceed without them (q).

Arbitrators are considered as acting corruptly where they

(g) See *Lucas v. Wilson*, 2 Burr. 701, and *Lord Lonsdale v. Littledale*, 2 Ves. jun. 453. Sed. Vid. 2 Ves. jun. 23.

(h) *Chicote v. Lequesne*, 2 Ves. 315. *Pownal v. King*, 6 Ves. 10, contradicting *Spettigne v. Carpenter*, 3 P. Wms. 361. *Symes v. Smith*, 4 Madd. Rep.

(i) — *v. Mills*, 17 Ves. 421.

(k) *Crawshaw v. Collins*, 1 Wils. C. C. 31.

(l) *Price v. Williams*, 3 Bro. C. C. 164. *Cornforth v. Geer*, 2 Vern. 705.

(m) *Morgan v. Mather*, 2 Ves. jun. 18. See *Emery v. Wase*, 5 Ves. 846.

(n) *Morgan v. Mather*, on Rehearing, 2 Ves. jun. p. 22.

(o) *Pedley v. Goddard*, 7 T. R. 78.

(p) *Walker v. Frobisher*, 6 Ves. 70; and see 9 Ves. 68.

(q) *Featherstone v. Cooper*, 9 Ves. 68. *Waller v. King*, 2 Mod. 63.

act as Agents; and also where they take Instructions, or talk with one Party in the absence of another (r).

715*] An Award will not be set aside because an *Arbitrator has used the judgment of another Person (s).

If an Award be made a Rule of Court, and an *Attachment* is taken out for not performing the same, the Attachment is gone by the Death of the Party, and the remedy it has been held, is lost (t).

CHAP. VII.

PAPISTS AND JEWS.

By the Statute 11th & 12th Wm. III. c. 4, if any *Popish Parent* shall refuse to allow his Protestant Child a fitting Maintenance, with a view to compel him to change his Religion, the Lord Chancellor is authorized, by order of the Court, to constrain him to do what is just and reasonable (u). This Act did not extend to Persons of another Religion; and in the year after the passing of it, a Jew, of immense riches, whose only Daughter had embraced Christianity, turned her out of doors, and on an application for relief under this Statute, it was refused (x); a decision which gave rise to the Act, 1st. Anne, st. 1, c. 30, whereby it is proved, that if any Jewish Parent, in order to compel his or her Protestant Child to change his or her Religion, shall refuse to allow such Child a fitting Maintenance, suitable to the degree and ability of the Parent, and to the Age and Education of such Child, then, upon complaint to 716*] the Lord Chancellor,* or Lord Keeper, &c. it shall be lawful for the Lord Chancellor, &c. to make such order for the Maintenance of such Protestant Child as he or they shall think fit.

Upon this Act, Lord *Macclesfield* was of opinion, with regard to the Court's Allowance of Maintenance out of a Jew's Estate, to a Daughter, turned Protestant, that it is not material, though the Daughter be above forty years of age, or married, or though the Jew be dead (y).

CHAP. VIII.

TENANTS FOR LIFE; 6TH ANNE, C. 18.

By this Statute it is provided, that any Person claiming an Estate in Remainder, Reversions, or Expectancy, after the death

(r) *Featherstone v. Cooper*, 9 Ves.

(u) See 1st vol. *Blac. Com.* 449.

69. (s) *Emery v. Wase*, 5 Ves. 848.

(z) *Lord Raym.* 699. 1 *Black Com.*

(t) *Webster v. Bishop*, 2 Vern. 444.

(y) *Vincent v. Fernandez*, 1 P. Wms. 524.

Pre. in Ch. 233; and see 2 Eq. 93. Ca. 6; and see *Nicholls v. id.*, 14 Ves. 269.

of any Person, a Minor, married Woman, or any Person whatsoever, upon Affidavit made in the Court of Chancery, by the Person so claiming such Estate, or his or her title, and of cause to believe that such Minor, married Woman, or other Person is dead, and that the Death is concealed by the Guardian, Trustee, Husband, or other Person, he may once in a year, move the *Lord Chancellor, &c.* to order the Production of such Person or Persons, (not exceeding two, and if the production is refused, the Person so concealed shall be taken to be dead, and the Person entitled in Remainder, &c. may enter upon the Estate, the Statute has been held to apply to the case of a Tenant for ninety-nine years, if she (a feme covert) should so long live, with remainder to Trustees to preserve *contingent Re- [*717 mainders, Remainder to the Heirs of the body of the Wife, and for want of such Issue, to the Trustees; upon Trust, to sell and divide the produce among certain Persons; and on the application of the Trustees, and the *Cestuis que Trust*, the Husband who held the Estate in right of his Wife, was ordered to produce his Wife, the Tenant for Life (z).

By a previous Act, 19th Cha. II. c. 6, s. 2, it is enacted, that if the Persons for whose Lives Estates are granted, shall go abroad, and no sufficient proof be made that they are alive, in any Action commenced for the recovery of the Lands by the Lessors, or Reversioners, the Judge shall direct the Jury to give their Verdict, as if the Persons so remaining abroad were dead. And it has been held that a Remainder-man is within this Statute.

CHAP. IX.

MARRIAGE ACTS.

By the 26th Geo. II. c. 33, Marriages by License, where either Party, not a Widow or Widower, is under twenty-one, are rendered null and void without the consent of the Father or Guardian, or of the Mother, if living and unmarried, in case there is no Father or Guardian, previously had and obtained; and if the Father, or Guardian, or Mother, be non compos, abroad, or refuse to consent, the Party may apply to the Lord Chancellor, who, if he approve of the Marriage, may declare his approbation accordingly; after which, the solemnization of the Marriage will be legal.

(z) Ex parte Grant, 6 Ves. 512.

*CHAP. X.

PRIVATE ACTS.

A JURISDICTION is given by the 33d Geo. III. s. 54, to proceed in a summary way in regard to these Societies.

The preference given to Friendly Societies over other Creditors (a) is confined to Debts in respect of Money received by Officers of these Societies, *by virtue of their Offices*, and independent of contract; and therefore if these Societies, instead of resting upon the Security which the Legislature gives them, *lend Money to one of their Officers (b)*, or to any other Person (c), upon a special Contract between him and them, as for instance, a promissory Note, that is a Loan, and is not considered as Money in such Person's hands within the protection of the Act of Parliament.

But if Money be in a Treasurer's hands, and apprehensions are entertained of it, and the Money is demanded and cannot be obtained, and only a Security can be had, such an *involuntary* proceeding would not, perhaps, be construed to take away the liability of the Treasurer within the Act.

A Treasurer, to be considered as such within the meaning of the Act, must be a *Person elected and accepting the Office (d)*.

719*] *After one Order upon *Petition* under the Act, the subsequent Orders may be obtained on *Motion (e)*.

CHAP. XI.

PRIVATE ACTS.

A JURISDICTION is frequently given to the Chancellor under private Acts. In all these cases the Chancellor strictly and literally follows the authority given him by such Acts. It will not be expected that we should detail the various Authorities which have from time to time been given under such Acts. They live and die with the occasion, and are not of general importance.

When, by Act of Parliament, Money is directed to be laid out in Lands, it cannot be laid out in Copyhold Lands, as in that way, by the custom of the Manor, a younger Son might have a

(a) See Section 10 of the Act.

(b) Vide Stamford Friendly Society, 15 Ves. p. 280; and see *ex parte* "The Amicable Society of Lancaster," 6 Ves. 98.

(c) Vid. *Ex parte*, Ashley, and *ex*

parte Corser, 6 Ves. 441; and *ex parte* Ross, *ib.* p. 802.

(d) *Ex parte* Ashley, 6 Ves. 444 S. P. *Ex parte* Ross, 6 Ves. 803, 4.

(e) *Ex parte* a Friendly Society, 10 Ves. 287. *Ex parte* Slewing's Charity, 3 Meriv. 707.

preference ; but where the Purchaser was Lady of the Manor, it was held the Copyhold might be purchased, because, on the surrender to her, the Lands would be enfranchised, and go to the eldest Son (f).

Under a private Act for the Sale of Estates, directing the Conveyance to be such as the Court should think proper, the Court refused to decide, upon the opinion of a Conveyancer, as to what was the proper Conveyance, but referred it to the Master (g).

Under a private Act of Parliament, Money was directed to be paid to certain Parties ; upon Petition *to the Court, [*720 the Lord Chancellor refused to make an Order to pay the Money to Persons deriving Title from the original Parties, and ordered them to file a Bill (h).

Where a summary power was given to the Chancellor by a private Act of Parliament, to vary the constitutions or provisions of a Charity, the Lord Chancellor refused to increase the number of Trustees, or to diminish the number of the Quorum ; because, though his Jurisdiction might extend to varying By-laws, or particular provisions, it did not comprise a power to alter the general constitution of the Trust itself, and therefore that the application must be to Parliament (i).

CHAP. XII.

JUSTICES OF THE PEACE.

JUSTICES of the Peace, as Judges of Record, appear to have been first created by Statute (k). After their first institution the choice of them appears to be in the Crown, and assigned by the King's Commission, until, says *Prynn*, the Statute of the 13 R. 2. c. 7, by which the Chancellor, Treasurer, and Clerk of the Rolls, and others, were appointed "to name and make them." By the 18th Hen. 6, cap. 1, the Chancellor alone, "in case there be no Men of sufficiency in *the County, and where [*721 none of twenty pounds per annum are to be found," was enabled to appoint ; but if there were Men of sufficient Estates in the County to be found, *Prynn* was of opinion that no appointment could be made, unless by the Persons mentioned in the before-mentioned Statute of Richard (l). Since that period, however, Justices of the Peace have been appointed by the King's special Commission under the Great Seal, and the Chancellor may displace them at his discretion, though *Prynn* seems to have

(f) Ex parte Lady Downshire, MS. 19th Feb. 1818, before V. C. Leach.

(g) Ex parte the Duchess of Newcastle, 6 Ves. 454.

(h) Ex parte King, 2 Bro. C. C. 156.

(i) Ex parte Bolton School 2 Bro. C. C. 662.

(k) Vide 18 Edw. 3, stat. 2, cap. 2, and 34 Edw. 3, c. 1.

(l) Vide *Prynn*, in *Somers's Tracts*, 16th vol. p. 446. 1st ed.

doubted whether some *matter of Record* should not appear to disable one who is a Justice of Record (*l*). Lord Somers, in the time of King William, occasioned very considerable ill will, by displacing a number of Justices of the Peace who had shown an unwillingness to sign the celebrated Association Paper in favour of that Monarch.

The power of the Court of Chancery, as to *Justices of the Peace*, extends only to the putting them in Commission; but after they are once in the Commission of the Peace this Court has no right to punish them for any mal-behaviour: the only redress is to move the Court of King's Bench for an Information, and afterwards the Complainants may apply to this Court to turn them out of the Commission (*m*).

722*]

*CHAP. XIII.

TRAVERSES.

WHENEVER the King had a direct Title of Freehold or Inheritance appearing for him by matter of Record, (whether that Record was judicial or ministerial, or was a Conveyance of Record, or was a matter of fact found by office of Record,) the Subject, by the *Common Law*, was put to his *Petition of Right*, and could not interplead with the King, either by traversing the King's Title, or avoiding it by setting up any Title of his own (*o*). By subsequent Statutes (*p*), however, the Subject has a right to traverse the Right of the Crown, provided leave is given for that purpose, on an application by Petition to the Great Seal; in which the Petitioner must show so much of Title in himself as to induce the Chancellor to permit the Traverse (*q*).

Traverses of Inquisitions of Idiocy and Lunacy will afterwards be considered.

(*l*) Vide Prynne, in Somer's Tracts, 16th vol. p. 446. 1st ed.

(*m*) Ibid.

(*n*) Ex parte Rooke, 2 Atk. 2.

(*o*) Per Lord Somers in the Bankers Case, Howell's State Trials, vol. 14, p. 77; and see 5 Co. 55a. there cited.

(*p*) See 34 Edw. 3. 36 Edw. 3, c.

13. 8 Hen. 6, c. 16. 18 Hen. 6, c. 6. 1 Hen. 8, c. 8. 2 & 3 Edw. 6, c. 8.

(*q*) Vide Ex parte Webster, 6 Ves. 809. Ex parte Sadler, 1 Madd. Rep. 581; and Ex parte Lord Gwydier & another, 4 Madd. Rep. In this last case the subject is elaborately considered by Vice-Chancellor Leach.

*BOOK IV.

SPECIALLY DELEGATED JURISDICTION.

Idiots and Lunatics.

THE origin of the Crown's authority over Idiots and Lunatics no where clearly appears. *Lord Coke* says, the King had not this Prerogative when *Magna Charta* passed, nor when *Bracton* wrote, but had it when *Britton* wrote; and for this he cites *Fleta*; and is of opinion that when *Magna Charta* passed, the Guardianship of Idiots, &c. was in the Lord and others, according to the course of the Common Law (a).

The better opinion seems to be, that the Right of the Crown existed prior to the Statute *De Prærog. Regis*, 17th Edw. 2 (b), and that this Statute was but an affirmance of the Common Law (c). This point, however, has been justly observed to be more a matter of curiosity than of use (d).

Before the *Court of Wards* was erected, the Jurisdiction in cases of Idiots and Lunatics was exercised in the Court of Chancery, and therefore, whilst the former Court existed, all Commissions respecting them were taken out of Chancery and returned there; and after *the Court of Wards (a mischief- [*724 ous Court) was taken away by Act of Parliament (e), it reverted back to the Court of Chancery (f).

The Administration of Idiots and Lunatics Estates is, in virtue of a *personal* authority (g), given by the Crown (h), viz. a special Commission under a Warrant of the King's Sign Manual, countersigned by the Lords of the Treasury (i), not directed to the *Court of Chancery*, but a certain great Officer of the Crown, not of necessity the Person who has the custody of the Great Seal, though it generally attends him by a Warrant from the Crown, in which it is stated to be given to him in consideration of its being his duty as Chancellor, to issue the Commissions on which the inquiry as to the facts of Idiocy or Lunacy is to be obtained (k). It is said the Warrant confers no Jurisdiction, but only a power of Administration (l). There is an instance where the Lord High Treasurer had the Warrant (m).

(a) 2 Inst. 14.

(b) See *Beverley's Case*, 4, Co. 126, 127; and ex parte *Grimstone*, mentioned 2 Ves. jun. 75, note (n) and reported in *Ambl.* 707; see also *Oxenden v. Lord Compton*, 2 Ves. jun. 71, S. C. 4 Bro. B. C. 232.

(c) *Hob.* 215.

(d) *Ambl.* 707.

(e) 12 Car. 2. c. 24.

(f) *Corporation of Burford v. Lenthall*, 2 Atk. 553.

(g) 2 Atk. 553. Ex parte *Phillips*, 19 Ves. 122.

(h) Ex parte *Phillips*, 19 Ves. 122.

(i) 2 Sch. & Lefr. 157, 438.

(k) 2 Sch. & Lefr. 157. Ex parte *Fitzgerald*, *ibid.* 438.

(l) See ex parte *Grimstone*, mentioned 2 Ves. jun. 75, note (n), and reported in *Ambl.* 707; and see also *Oxenden v. Lord Compton*, 2 Ves. jun. 71, S. C. 4 Bro. B. C. 232. *Wigg v. Tiler*, 2 Dick. 552.

(m) 2 Dick. 553.

The Warrant gives a special authority to make a Grant of the Custody of Lunatics and Idiots in the right of the Crown, and to make Grants from time to time of the Idiot's and Lunatic's Estates (n), and to provide for the Maintenance of Idiots 725*] and Lunatics,* and for the care of their Persons and Estates (o), but extends no farther; and the Grant being made, the Chancellor then acts, not under the Warrant, but as a Keeper of the King's Conscience, in the exercise of this branch of the Prerogative. If the Warrant was granted to any other Officer of State it would not enable that officer to act after the Grant made, but merely to direct the Grant (p).

For Lunatics, the Crown is but a Trustee; but in the case of an Idiot, the Crown is absolutely entitled to the Profits, subject to the Maintenance of the Idiot (q), and it has therefore been doubted whether the Chancellor could, by Letters Patent under the Great Seal, grant to any Person, for his own benefit, the surplus Profits of the Estate of the Idiot (r).

If the power is abused, if any thing wrong is done, or error committed, the appeal is immediately to the King in Council, and not in the ordinary course attending the established Jurisdictions of the Kingdom (s).

The authority of the Chancellor being personal, the Master of the Rolls has no Authority to sit for him in Lunacy (t).

Persons are seldom found Idiots, but only *non compos mentis*, 726*] and when they are found Idiots, *it is very rarely that the Crown has claimed that Interest in their property to which it is legally entitled (u).

Though a man be found an Idiot by inquisition taken before the sheriff, after an examination by the Jury, and the same is returned into Chancery, yet he who is so found Idiot may in person, or by his friends, come into Chancery before the Chancellor, &c. and show the matter, and pray that he may be examined before the Chancellor, whether he be Idiot or not; and if upon examination he is found no Idiot, then the inquisition found before the sheriff, and also the examination which the sheriff hath made and returned thereupon, will be of no ef-

(n) In the matter of Heli, 3 Atk. 635.

(o) *Lysaught v. Royse* 2 Sch. & Lefr. 157.

(p) Ex parte Simon Degge, mentioned in note 4 Bro. C. C. 237; and see on this point 2 Atk. 553; and ex parte Grimstone, Amb. 707; and what is said ex parte Fitzgerald, 2 Scho. & Lefr. 438.

(q) See in the matter of Fitzgerald 2 Scho. & Lefr. 436.

(r) *Lysaught v. Royse*, 2 Sch. & Lefr. 157.

(s) 2 Ves. jun. 71. 4 Bro. C. C. 238, in note. See *Lords Journal*, Die Martis, 14 Feb. 1726. 23 vol. *Journ. House of Lords*, 38. *Sheldon v. Fortescue Aland*, 3 P. Wms. 104.

(t) *Collinson's Law of Idiots and Lunatics*, 1 vol. 105.

(u) *Collinson's Law of Idiots and Lunatics*, 1 vol. p. 100.

fect, but the same will be taken as void without any other traverse (x).

One found an Idiot had leave to traverse the Inquisition, on condition that she would appear in person at the Trial (y).

The custody of an Idiot cannot, it seems, be granted to a man, his *Executors, Administrators and Assigns* (z).

The rules of Law and of Equity are the same as to what amounts to *Incuria* (a). (1)

Non Compos Mentis has been defined by Lord Coke, to be a person "who was of good and sound memory, and by the visitation of God has lost it (b) ;" and in another Work, two sorts of Persons are considered by Lord Coke to be *non compos mentis* ; "1. *Idiota*, which from his nativity, by a perpetual infirmity, is *non compos mentis* : 2. He that by sickness, grief, or other accident, wholly loseth his memory and understanding (c).

When the disease of Lunacy is excessive, a common observer may positively pronounce upon it ; but the first inroads of the complaint must often be imperceptible even to the most practised eye. As the eloquent D'Aguesseau observes, "the doubtful and uncertain point at which reason disappears, and where incapacity becomes evident and manifest, can only be fixed by the particular circumstances of each individual case."

In the view of the law, a Lunatic is never looked upon to be desperate, but always at least in a possibility of recovering (d).

Being *non compos*, of unsound mind, are certain terms in law, and import a total deprivation of sense. There may be weakness of mind that may render a man incapable of governing himself, as violence of passion, or vice, and extravagances, and yet not sufficient, under the Rule of Law, and the Constitution of this country, to authorize a Commission (e).

"*Lunatic*," says Lord Hardwicke, "is a technical word, coined in more ignorant times, as imagining those persons were affected by the Moon ; but it is discovered by philosophy and ingenious men, that it is entirely owing to a defect of the organs

(x) In the matter of Heli a Lunatic, 3 Atk. 635.

(y) Mos. 71.

(z) *Prodgers v. Phrazier*, 1 Vern. 9. S. C. 2 Show. 171. 2 Ch. Ca. 70.

(a) *Bernet v. Wade*, 2 Atk. 327. *Osmond v. Fitzroy*, 3 P. Wms. 130.

(b) *Beverley's case*, 4 Co. 124.

(c) Co. Litt. 247a. As to the forms of Commissions in cases of Lunacy, Idiocy, &c. see Mr. Vesey's note to *ex parte Cranmer*, 12 Ves. 451 ; and his observations on those forms.

(d) *Dormer's case*, 2 P. Wms. 265.

(e) *Ex parte Barnaley*, 3 Atk. 173.

(1) A person deaf and dumb from his nativity, is not to be deemed an idiot, or *non compos mentis*, as a matter of course ; though such may be the legal presumption, until the soundness of his natal capacity is proved. *Brower v. Fisher*, 4 Johns. Ch. Rep. 441.

728*] of the *body (f).” Blackstone, however, seems to attribute Lunacy to the influence of the Moon (g); but the idea, though very ancient and prevalent, is certainly considered as erroneous.

The first proceeding to obtain a Commission of Lunacy is to present a petition to the Chancellor, stating the Party’s incapacity, and praying a Commission, accompanied by Affidavits evincing the Lunacy of the Party. On this Petition and Affidavit a Commission will be issued under the Great Seal, in which five Commissioners are named, though the attendance of three is sufficient (h). It seems the Commission cannot be altered after it is issued (i). If the Commission is to be executed in the *Country*, two of the Commissioners must be Barristers, the remainder Attornies or such Persons as the Chancellor may approve. If the Commission is to be executed in or near *Town*, the Commissioners are all nominated by the Chancellor.

If a Caveat has been entered, and the Commission is to be executed in the *Country*, the Party against whom the Commission is prayed will have leave to present a list of Commissioners in addition to the list of the Party applying for the Commission (k).

The Commission must be executed within a month after it is obtained. Upon notice to the Commissioners they issue a War-729*] rant to the sheriff of the place *where the Party resides, if he be within the Realm (l), directing him to summon a Jury of twenty-four persons. If the witnesses will not voluntarily attend, the Commissioners may sign and seal a Subpœna to be served upon them; a power they exercise, not under any positive provisions of an Act of Parliament, but by implication, and as necessary to enable them to execute the Commission, the Commissioners exercising the authority which before belonged to the *Escheator* or *Sheriff* (m), under the old Writ (n). The Jury, which must consist of at least twelve persons, are sworn, and the Commissioners explain the business to them; the witnesses, and the supposed Lunatic, (who is entitled to be present if he chooses (o), if necessary, are examined, and the Jury sign the Inquisition on paper. If the persons in whose custody the Lunatic is, have refused to produce him, the Court has blamed them extremely, and made them pay Costs (p); and might, it

(f) Ex parte Barnsley, 3 Atk. 174.

(g) 1 vol. Com. 304.

(h) Highmore on Idiots and Lunatics, 242.

(i) Ex parte Baker, 19 Ves. 341.

(k) 2 Collins. on Idiots and Lunatics, 152.

(l) Ex parte Baker, 19 Ves. 341.

(m) See ex parte Lund. 6 Ves. 784.

(n) See Fitz. Nat. Brev. 530. *Sed*

qu. whether a writ was ever directed to the Escheator to inquire of Lunacy as in the case of *Idiotcy*. Ex parte Southcote, Amb. 111. S. C. 2 Ves. 401.

(o) Ex parte Cranmer, 12 Ves. 455.

(p) Ex parte Southcote, 2 Ves. 405. S. C. Amb. 111.

seems, commit them (q). On the following day the Inquisition is ingrossed on parchment, and signed by the Commissioners and the Jury. The Inquisition must be returned into Chancery within a month after it is obtained (r).

A Commission of Lunacy may be ordered against a person resident *abroad*, (1) to be executed in the *County where [*730 the mansion-house lies (s). The Commissioners cannot execute the Commission beyond Sea, as in the case of a Commission to appoint a Guardian, because the authority is not in them alone, but in the Jury too (t). In these cases the Lunatic cannot be examined, and where he is in the Country, but has concealed himself, he may be adjudged a Lunatic, though not personally examined (u).

The order that the Jury shall be of the neighbourhood is usual, and is consequential upon the direction, that the Commission shall be executed at the place of abode (x). The abode is, his mansion-house, or, if he has none, where the Lunatic lived prior to his Lunacy (y); not that to which he has since been conveyed; and this, although he is unable to bear removal (z).

An inquiry is always made from what period the Lunacy commenced; and the reason is, that when it appears the Lunacy is of some duration, and that the Lunatic has performed acts, an examination is necessary into the circumstances of competence or incompetence under which those acts were performed (a).

The granting of a Commission of Lunacy is matter of *discretion* in the person granting it, and is not in all cases granted merely because the fact of Lunacy is established (b). "There may be cases," says *Lord Eldon*, "where the granting the Commission might for ever prevent a cure (c)."

*On the Petition of a Creditor (d), or even of a Stranger, a Commission of Lunacy will be ordered to be issued without regard to the motives of the Person applying for the Commission (e).

(q) *Lord Wenman's case*, 1 P. Wms. 701.

(r) *Highmore on Idiots and Lunatics*, p. 242, and *Collinson*, 1 vol. 140.

(s) *Ex parte Southcote*, *Ambl.* 109. S. C. 2 Ves. 401.

(t) *Ex parte Southcote*, *Ambl.* 112.

(u) As in *Ludlam's Case*, MS.

(x) *Ex parte Hall*, 7 Ves. 264.

(y) *Ex parte Baker*, 19 Ves. 341.

(z) *Ex parte Smith*, 1 Swanst. 4.

(a) *Ibid.* 6.

(b) *Ex parte Tomlinson*, 18 Ves. 58.

(c) *Ibid.*

(d) In the matter of *Ball*, 1 *Collinson on Idiots and Lunatics*, 377. *Ex parte Tutin*, 3 Ves & Bea. 149.

(e) *Ex parte Ogle*, 15 Ves. 112.

(1) Vide *Perkins' case*, 2 Johns. Ch. Rep. 124.

An inquisition of lunacy taken abroad, or in another state, will not authorize a sale of the lunatic's estate; but it may warrant the issuing of a new commission, and perhaps, may be sufficient evidence to justify an inquisition on such new commission. *Ih.*

If a Clergyman becomes *non compos*, and the duties of the Church are not performed by some other person, the Churchwardens may, *ex officio*, apply for a Commission of Lunacy; and with the permission or approbation of the Bishop of the Diocese, obtain a Sequestration, and employ a proper Curate, or the Bishop or Archbishop may appoint a Curate (*f*).

When a Commission issues, the Commissioners issue their Precept to the Sheriff to summon a Jury, which must consist of twelve persons at least, and the whole number must concur.

A Commission, not of Lunacy, but in the nature of a Writ *De Lunatico Inquirendo*, may be issued, where the Party is, from any cause, whether by Age, Disease, Affliction, or Intemperance, incapable of managing his own affairs (*g*). (1). This doctrine, however, seems to have sprung up since Lord Hardwicke's time (*h*), and was rather arbitrarily introduced; so, much so, 732*] that it has more than once been *hinted that some Legislative Provision on the subject would be proper; since many difficult and delicate cases with regard to the liberty of the subject may arise out of the doctrine (*i*). Such is the perishable fabric even of the finest genius that Lord Somers, the Duke of Marlborough, Dean Swift (*k*), and Lord Mansfield, might, at the close of their lives, have been made the subject of such a Commission!

The proceedings on the Commission, to inquire whether or no the party be *non compos*, are on the Law-side of the Court of Chancery, and can only be redressed, if erroneous, by Writ of Error, in the regular course of Law (*l*).

If the *Non Compos* dies before office found, no Inquisition can be taken (*m*).

Vagrants only, and not persons of Rank, are within the Act (*n*) that empowers Justices of the Peace to take care of Lunatics (*o*).

Where the Lunatic's fortune is small, references to the Master, in the first instance, have been ordered, to see what is proper to be allowed the Lunatic for Maintenance, to avoid the expense of a Commission (*p*). And where the property has

(*f*) 1 Collinson on Idiots and Lunatics, 361.

(*g*) Vid. 1 vol. Black. Comm. p. 304. Gibson v. Jeyes, 6 Ves. 273. Ridgeway v. Darwin, 8 Ves. 65. Ex parte Cranmer, 12 Ves. 445.

(*h*) See Lord Donegal's Case, 2 Ves. 407, and the case mentioned in p. 408, 9, before Lord Harcourt.

(*i*) Ridgeway and Darwin, 8 Ves. 66, and Ex parte Cranmer, 12 Ves. 445.

(*k*) "From Marlborough's eyes the streams of dotage flow,
"And Swift expires a driv'ler and a show."

(*l*) 2 Bl. Comm. 427.

(*m*) 4 Co. 127a.

(*n*) 17th Geo. 2. c. 5, s. 20. See also the 48th Geo. 3 c. 96, s. 19, 20.

(*o*) 2 Atk. 51.

(*p*) Machin v. Salkeld, 2 Dick. 534, and the cases there mentioned.

been small, (500*l.* for instance,) the Court has, to avoid the expense of a Commission of Lunacy, (which is about 120*l.*) upon Affidavits of the Petitioner's mind, and the amount of her fortune, ordered payment, without *a reference to the Mas. [*733 ter, of the dividends of the two next quarters, and then to apply again, by a short Petition ; so that the Court might know the state of the Party's mind, and the amount of her fortune from time to time (q).

In a case where there was a Fund in Court payable to the Plaintiff, the Husband, who was of too great imbecility, in consequence of a paralytic stroke, to do legal acts, the Interest was on Petition ordered to be paid to the Wife, from time to time (r).

So, where, a Wife became insane, who was entitled to a separate Property, but no Commission had issued, and the Husband made an application for an allowance, inquiries were directed, as to the Husband's ability to support her ; but it seems that neither with or without a Commission of Lunacy could the Chancellor order an application of her separate Income, unless by way of arrangement (s).

By the Statutes 8 and 18 Hen. 6th, there ought to be a month's time between the return of the Inquisition and the Grant of the Custody and Land, to enable Parties to come in and tender a Traverse (t).

A Traverse may be tendered at any time (u), upon giving Security to the value of two years profits of the Lands (x).

The uniform return in Inquisitions of Lunacy, except in a few instances is, *Lunaticus ; non compos mentis ;* or, *insana mentis ;* or since the proceedings *have been in English, of [*734 *unsound mind* (y). A return, that A. B. *is incapable of governing himself and his Lands, &c.* is a void return (z).

The return to the Inquisition cannot be objected to because it merely states the Party to be a Lunatic, and the time the Lunatic has been so, but does not state that the Lunatic has, or has not, lucid Intervals (a).

If there is any misbehaviour in the execution of an Inquisition, it will be examined into, and if the Court see cause, they may quash it, and direct a new commission (b). (1).

A *Melius Inquirendum* is grantable only at the instance of the Crown, which cannot traverse as the Subject can (c).

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| (q) Eyre v. Wake, 4 Ves. 795. | (y) Ex parte Barnaley, 3 Atk. 171 ; |
| (r) Bird v. Le Fevre, 4 Bro. Ch. Ca. 101. | and see ex parte Cranmer, 12 Ves. 455. |
| (s) See Brodie v. Barry, 2 Ves. & Bea. 36. | (z) Ibid. 3 Atk. 168, &c. |
| (t) Ex parte Roberts, 3 Atk. 7. | (a) Ex parte Wragg, 5 Ves. 450. |
| (u) 2 Edward 6th. | (b) Ex parte Roberts, 3 Atk. 6. |
| (x) 1 Collinson, 169. | Ex parte Barnaley, 3 Atk. 185. |
| | (c) 3 Atk. 6. |

It is not unusual for the Chancellor to inquire by *inspection* after an Inquisition, returned (*d*); but if upon such inspection he is doubtful, he puts the Party to his *Traverse* as provided by the Statute (*c*). (*l*).

The Act of the 34th Ewd. 3, c. 14, gives the Lunatic a right to traverse, and by the 2d Edward 6th, c. 8, s. 6, it is very fully provided, "if any shall be untruly found Lunatic, or Idiot, that every person or persons grieved by any such office or Inquisition, shall and may have his or their *Traverse* to the same, immediately, or after, at his or their pleasure, and proceed to Trial 735*] therein, and have like remedy and *advantage, as in other cases of *Traverse* upon untrue inquisitions or offices founded."

It has been held that a *Traverse* cannot be had without the consent of the Chancellor (*f*), who acts at his *discretion* in these cases (*g*), though the Statute seems to entitle the Party to it as of right; and, indeed, from the Modern Cases, it seems that the Chancellor cannot refuse to allow the Party to traverse (*h*).

But where a Person has been found a Lunatic under two Inquisitions, the Court will not allow him to *traverse* the second (*i*); though the Chancellor may afterwards direct an Issue (*k*); whereby it is observable there may be two inconsistent Records; one, finding the Party a Lunatic, the other not.

It is clear, the Custody of the Lunatic cannot be suspended without leave of the Court; and on that account, probably, applications were made for the consent of the Court to *traverse* (*l*). Not only the Lunatic, but the Heir of the Lunatic, is bound upon the *Traverse* of the Inquisition (*m*).

A person cannot *traverse* an Inquisition without bringing the 736*] Lunatic in *propria persona* before the *Court (*n*), for the purpose of ascertaining whether it is the wish of the Party to *traverse* (*o*). It is the same as to *Idiots*. With respect to *Idiots*, the Rule is laid down in *Fitzherbert* (*p*), and it is the same as to Lunatics (*q*).

(*d*) See *Skin*. 5.

(*e*) 2 Edw. 3th, c. 8. s. 6. 3 Atk. 6. 312.

(*f*) 3 Atk. 6. *Sir John Cutt's Case*, Ley. 86, 7; but see *Ex parte Barnsley*, 3 Atk. 185.

(*g*) In re *Fust*, 1 Cox, 429.

(*h*) See *ex parte Ferne*, 5 Ves. 832. *Sherwood v. Saunders*, 19 Ves. 284.

(*i*) *Ex parte Barnsley*, 3 Atk. 184.

(*k*) *Ex parte Holyland*, 11 Ves. 10.

(*l*) 3 Atk. 6. Vide *Stone's Case*, in *Tremaine's Pleas of the Crown*, 653; and *Lane's Entries*, 652, precedents

of a *Traverse*; and for the doctrine of traversing an Inquisition, Vid. 4 Co. 54b. the *Case of the Commonalty of the Sadlers*; and 8 Co. 168. *Paris Stoughton's Case*, *Sir T. Jones*, 198. *Show*. 199. *Skinn*. 45. S. C. 3 Atk. 7.

(*m*) *Roberts' Case*, 3 Atk. 312.

(*n*) In the matter of *Heli*, 3 Atk. 635.

(*o*) 19 Ves. 284.

(*p*) *Fitzb. Nat. Bre*. 532; and see *Anon. Moseley*, 171.

(*q*) 3 Atk. 635. *Ambl*. 112.

Upon a Petition of the Lunatic to the Chancellor, or if the Lunatic be a married Woman, upon a Petition of the Husband and Wife, for leave to traverse the Inquisition, the Traverse is allowed, *as of right*, and proceedings under the Commission, and taking possession of the Property, are suspended (1). The pleading a Traverse is short. The inquisition is stated; the common Traverse taken upon it, and the Attorney-General joins Issue; the Records may then be immediately sent to the Court of King's Bench (r), the only Court in which a Traverse can be tried (s) (2).

If the Commission is traversed with success, no Costs can be given to the Party taking out the Commission, however meritorious; (·) because, no Property coming to the Possession of the Crown, there is no Fund out of which to pay them (t); but there may be given out of a Fund of the Lunatic, in Court, in a cause (u).

A Person having an *Interest* under a Contract with the Lunatic, an *alienee* for instance (x), or a *Person who has contracted to sell Property to the *Non Compos* (y), is entitled to traverse (z); but a mere *Stranger* having no Interest, is not, it seems, allowed to traverse (a). If a Party submitting to a Traverse refuses afterwards to be bound by it, it is considered as a Contempt (b).

An improper attempt to traverse will be dismissed with Costs (c) (4).

(r) Ex parte Wragg, 5 Ves. 452.
S. C. 5 Ves. 833.

(s) See on this subject, 4 Burr. 851.

(t) Ex parte Ferne, 5 Ves. 832.
Sherwood v. Sanderson, Coop. 188.
S. C. 19 Ves. 286. Ex parte Glover,
1 Meriv. 271.

(u) Sherwood v. Sanderson, 19
Ves. 220.

(x) Ex parte Roberts, 3 Atk. 312;
and see 15 Vin. Abr. 141.

(y) Ex parte Morley, 9 Ves. 478.

(z) Ex parte Hall, 7 Ves. 262.

(a) Ex parte Ward, 6 Ves. 579.
Sed. Vid. Ex parte Southcote, Amb.
112.

(b) Ex parte Roberts, 3 Atk. 308.

(c) 1 Collinson on Idiots and Lun.
462.

(1) At the time of directing an issue to settle the question of lunacy, the court will, if necessary, make a provisional order for the care of the lunatic's estate, until the question is determined. *Wendell's case*, 1 Johns. Ch. Rep. 600.

(2) The care and custody of idiots and lunatics, being confided to the court of chancery, the whole control of the inquisition, and the manner in which that control is to be exercised, seems to depend entirely on the discretion of the court. A lunatic may be brought into court, after inquisition returned, and an inquiry had by inspection, as to the fact of his lunacy, or an issue at law may be awarded. The most usual and proper course is, to have the issue prepared for trial under the direction of the court, instead of delivering over the record and traverse, after issue joined, to a court of law. *Wendell's case*, *ut supra*.

(3) Where the inquisition is traversed unsuccessfully, by a relation of a lunatic, costs will be awarded. *Folger's case*, 4 Johns. Ch. Rep. 169.

(4) A prosecutor of a charge of lunacy, will not, of course, be ordered to pay costs, where the party is found to be of sound mind, provided the prosecution has been instituted upon probable grounds. *Brower v. Fisher*, 4 Johns. Ch. Rep. 441.

An Inquisition is only *presumptive Evidence* of Insanity, and not conclusive; so that upon an Action in respect of any Contract or Deed, it is for a Jury to determine, whether at the time of executing it the Party was *non compos*, though by the Inquisition he was found to be *non compos* at such period (d).

So, if the Question of Sanity arises in a Court of Equity, an Issue will be directed (e).

A Commission of Lunacy may be *superseded* if the Party is improperly, or irregularly (f), found *non compos*, and a Caveat may be entered by the Person against whom the Commission has issued, or any Individual on his behalf, against the appointment of Committees, on the ground that he had unjustly been found a Lunatic; and upon a Petition by the Lunatic, or such other Person in his Name (g) to supersede the Commission, a time [738*] will be appointed for his personal *appearance before the Chancellor in order to be inspected and examined; but without very strong Evidence, and the Affidavits of eminent Physicians, as to his Sanity and Capacity, the Chancellor will not set aside the Verdict of the Jury (h).

In one case, when the Lunatic was recovered and examined in Court, the Commission was superseded, and the Recognizance of the Committee ordered to be vacated, the Lunatic declaring himself satisfied with the account (i).

In another case, a Lunatic having recovered his understanding petitioned to have the Commission superseded, but the Court only superseded it for some months, to see if he was perfectly recovered, because he had often relapsed, and was found by the Inquisition a Lunatic with lucid intervals (k). An Issue is sometimes directed (l).

In order to supersede a Commission, Lord Thurlow was of opinion, that when Lunacy is once established by clear Evidence, the Party ought to be restored to as perfect a state of mind as he had before, and that it should be proved by Evidence as clear and satisfactory (m); but Lord Eldon did not concur in that proposition; something less than the same perfection of mind, he thought, would be sufficient (n). (1)

(d) Faulder v. Silk, mentioned, 1 Collinson on Id. and Lun. 396.

(e) Hall v. Warren, 9 Ves. 605.

(f) Ex parte Roberts, 3 Atk. 6.

(g) Ex parte Stanley, 1 Ves. 25.

(h) Harrison's Chan. Prac. 383. Newl. edition, 1 Collinson on Id. and Lun. 324.

(i) Mos. 78.

(k) Mos. 421.

(l) Ex parte Stanley, 1 Ves. 25.

(m) Attorney-General v. Parather,

3 Bro. C. C. 444.

(n) Ex parte Holyland, 11 Ves. 10.

(1) On the petition of a lunatic to supersede the commission, on the ground of his recovery, if the fact be not satisfactorily proved, the court will refer the petition to a master to take the proofs as to the allegations in the petition, and to examine the lunatic, if he should deem it advisable, and to report such proofs, with his opinion thereon. And if it should become necessary.

A doubt is suggested by *Staunford* (o), whether on *the [*739 Death or Recovery of a Lunatic, an *ouster le maine* must not be sued out, as in the case of an Idiot; nor does it appear there is an express decision on the subject; but in Practice, the Lunatic, when recovered, has Possession restored to him by an Order of Court (p). On the application of the Heir, after the death of the Lunatic, (where there is no dispute who is Heir) praying that the Committee might be ordered to deliver Possession to the Heir, the Court will order Possession to be delivered, and will not put the Heir to his Ejectment, or permit the Committee to retain the Possession by disputing the fact of Heirship (q). The direction in a Commission of Lunacy "to inquire who is next Heir," seems for the purpose of ascertaining to whom the property ought to be delivered after the death of the Lunatic. The Inquisition is not conclusive; the Person so found to be Heir may not be the Heir; the finding of the Jury, may be wrong; but *prima facie* he is to be taken as Heir (r).

A Commission of Lunacy kept back for several years, without putting it in execution, is a Contempt of the Court, and will be discharged with Costs (s).

If upon the return of the Inquisition the Party is found a Lunatic, and such finding is not Traversed, or the Commission superseded, Committees of his Person and Estate, are, in consequence, appointed by the Chancellor, under the authority derived to him from the King's Sign Manual. The Chancellor *(unless the Estate is extremely small) usually refers it to [*740 a Master to approve of a proper Person to act as Committee (t).

Relations are generally appointed in preference to Strangers, unless there is specific objection (u). The Wife of the Lunatic, jointly with a Relation, has been appointed a Committee of the Person of the Lunatic (x).

(o) Exposit. of King's Prerog. p. 37, subjoined to Staunford's Pleas of the Crown.

(p) See ex parte Fitzgerald, 2 Sch. & Lefr. 437.

(q) Ibid. p. 439.

(r) Ib. 440.

(s) 2 Atk. 52.

(t) See 1 Collinson, 194, 5. Picard, ex parte 3 Ves. & Bea. 127.

(u) Le Heup, ex parte, 18 Ves. 221.

(x) Ibid.

the lunatic, may, afterwards, be examined by the Chancellor. *Hanks' case*, 3 Johns. Ch. Rep. 567.

And so, on the petition of a lunatic, for the discharge of his committee, on the ground of his sanity, the court may allow him to traverse the inquisition, or to try the question by a feigned issue, at its discretion. *McClean's case*, 6 Johns. Ch. Rep. 440. And where the lunacy was satisfactorily established in the first instance, and after repeated applications for a discharge of the committee, the opinion of the court remained unchanged, the trial of the question of lunacy was directed to be at the expence of the lunatic, or his friends, and not at the charge of his estate; as, otherwise, his family might be deprived of their support, by a fruitless litigation. *Ib.*

The Committee of the Person, is frequently appointed Committee of the Estate also (y).

The Committee is considered merely as a Bailiff, appointed by the Crown, and under its control, to take care of the Property, and liable to account—to censure—to punishment, and to be removed if he shall misconduct himself; and therefore it is, that no Grant of a Lunatic's Estate can be made otherwise than during pleasure (z). The Control over the Committee is not determined by the death of the Lunatic (a).

A *Master in Chancery* cannot be appointed Committee of the Lunatic's Estate (b); and where a person had agreed to give part of the profits to another, he was not permitted to be Committee (c).

Where no one can be procured to act as Committee of the Estate, a Receiver may be appointed, with a Salary, upon giving 741*] such Security to the *Attorney-General*,* as a Committee does (d). In cases, likewise, where the Committee resides at a distance from the Estate (e); or is infirm; or where it has not been thought expedient to intrust the Committee with the property, a Receiver has been appointed (f).

In one case, the Brother of the Committee, not being able to give the usual Security required from a Committee, was appointed Committee of the Personal Estate of the Lunatic, with a restriction not to receive any Sums of Money, part of the Lunatic's Estate, and a Receiver appointed to account and pay the balance to the Accountant-General, after paying what should be allowed to the Petitioner for Maintenance of the Lunatic (g).

The old rule acted upon by Lord *Nottingham* (h), and adverted to by *Blackstone* (i) with seeming approbation, that the next of Kin of a Lunatic, if entitled to his real Estate upon his death, could not be a Committee of his Person, has not been adhered to for a great length of time (k); nor is it an objection to a Committee that he is the next of Kin to the Lunatic, and will come in for a Share of his personal Property under the Statute of Distributions (l) (1).

(y) See 1 Collinson, 256.

(z) Ex parte Fitzgerald, 2 Scho. & Lefr. 438.

(a) Ibid. 441.

(b) Ex parte Fletcher, 5 Ves. 427. It seems it has been differently determined in Ireland. See 2 Sch. & Lefr. 439, 441.

(c) 6 Ves. 427.

(d) Ex parte Warren, 10 Ves. 612.

(e) 1 Collinson's Idiot and Lun. 259.

(f) Ibid. 257.

(g) Ex parte Ballinghurst, Ambl. 104.

(h) See Lady Mary Cope's case, 2 Chan. Cas. 239.

(i) 1 Comment. 305.

(k) Ex parte Cockayne, 7 Ves. 598; and see ex parte Seaman, 1 Collinson, 207. Dormer's case, 2 P. Wms. 262.

(l) Ex parte Neal, 2 P. Wms. 544. The arguments urged for the decision in this case, as well as in ex parte Ludlow, 1b. p. 638, are not very forcible, though the decision itself seems proper.

(1) The heir at law, and child of a lunatic, may be appointed committee, and he may have the custody of the lunatic's person, real and personal estate. *Livingston's case*, 1 Johns. Ch. Rep. 436.

It is usual to take Bonds from Committees to account, and submit to orders, but it does not appear to *be absolute- [*742 ly necessary, for orders may be enforced independent of the Bond (m); and where Bonds have been taken, they have, on circumstances, been ordered to be delivered up (n), or greater Security taken (o).

So with regard to Committees finding *Securities*, the Chancellor, it seems, exercises a discretion. A Bond by the Committee and two Sureties, approved of by the Attorney-General, at double the Amount of the outstanding Estate, is what is usually required (p).

It has been found inconvenient to grant the custody of a Lunatic to two (q), for being a joint Grant, and a mere authority without any interest, the death of one determines the right to the Custody of the Lunatic (r); it is however, in Practice, usually done (s).

If the Committee of a Lunatic becomes a Bankrupt it is a ground for his removal; but the Custody of the Person will not be changed if it is necessary to the comfort of the Lunatic (t).

If Persons in whose custody the Lunatic is, refuse to deliver him to the Committee, they incur a Contempt of Court, and may be committed; nor is an **habeas corpus* necessary (u), [*743 but it may be had recourse to, if considered as eligible (u).

The Court, in making an *allowance* to a Lunatic, considers only his situation, always looking to the probability of his recovery, and never regarding the interest of the next kin. With this view only, in cases where the Estate is considerable, and the persons who will probably be entitled to it hereafter are otherwise unprovided for, the Court looking at what it is likely the Lunatic himself would do, if he were in a capacity to act, will make some provision out of the Estate for those Persons. So, where a large property devolves upon an elder Son, who is a Lunatic, as heir at law, and his Brothers and Sisters are slenderly, or not at all, provided for, the Court will make an allowance to the former for the sake of the latter. So also, where the father of a family becomes a Lunatic, the Court does not look at the mere legal demands which his Wife and Children may have upon him, but considering what the Lunatic would probably do, and what it would be beneficial to him should be done, makes an allowance for them proportioned to his circumstances. There are instances in which the Court has, in its al-

(m) Ex parte Grimstone, Ambler. 707. ex parte Roberts, 3 Atk. 5, 398.

(n) Ex parte Northlight, 2 Vez. 673.

(o) Ex parte Pereira, 2 Vez. 674.

(p) 1 Collinson on Idiots and Lun. 262, 3.

(q) Ex parte Ludlow, 2 P. Wms. 638.

(r) Ex parte Lyne, For. 143. and see Eq. Cas. Abr. 583; and 1 vol. MS. notes, 57.

(s) 1 Collinson, 227. See For. 143, S. P. Anon. MS.

(t) Ex parte Mildmay, 3 Vez. 2; and see Smith v. Bate, 2 Dick. 631.

(u) Ex parte Trammer, 12 Vez. 445.

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allowances to the relations of the Lunatic, gone to a farther distance than Grandchildren—to Brothers, and other collateral kindred; and on the principle, not because the Parties are next of kin to the Lunatic, or as such have any right to an allowance, but because the Court will not refuse to do for the benefit of the Lunatic that which it is probable the Lunatic himself would have done (x).

744*] *The Chancellor may, accordingly, order *Maintenance* for the Children of the Lunatic (y), or a sum for their *advancement*, or payment of their Debts (z).

The Committee of a Lunatic's Estate is never allowed any thing for his *Care and Trouble* (a); but, under circumstances, the Court will increase the allowance of Maintenance, which will operate as an allowance for Trouble (b) (1). A Committee will not be allowed Monies expended on the Lunatic's Estate, if laid out without a previous application to the Court (c); and if the Committee has not passed his Accounts regularly, according to his Recognizance, and as required by the General Order (d), he will not be allowed his *Costs* (e); nor is a Committee suffered to pass his Accounts without referring them to the Master to see what sums he has had in his hands from time to time, and if he is found to have kept Money in his hands unnecessarily, he must pay Interest for it (f).

In passing accounts from time to time of a Lunatic's Estate, notice should always be given to such of the Lunatic's relations to attend before the Master to check the Account, as would be entitled to a share of his estate if he had been dead intestate (g); not on account of any actual interest, but because they 745*] are *most likely to be able to give information to the Court respecting the situation of the Property, and are concerned in its good administration (h); but they are not to be allowed the Costs of such attendance, unless some special case be laid before the Court.

If a Committee disobeys an Order to pass his Accounts it is punishable as a Contempt.

(x) Ex parte Whitehead, 2 Meriv. 103.

(y) Foster v. Marchant, 1 Vern. 262.

(z) See cases mentioned, 1 Collinson on Idiots and Lunatics, 296, 7.

(a) Blunt v. Clitherow, 6 Ves. 802. Anon. 10 Ves. 104.

(b) Ambl. 78.

(c) Ex parte Marton, 11 Ves. 397. Ex parte Hilbert, ib. Attorney-General v. Vigor, 11 Ves. 563.

(d) 15 December, 1792. See Order, 2 Ves. jun. 39.

(e) Ex parte Clarke, 1 Ves. jun. 296.

(f) See ex parte Hilliard, 1 Ves. jun. 90. Ex parte Catton, ib. 156; and see ex parte Chumley, ib. Pococke v. Riddington, 5 Ves. 794.

(g) Ex parte Wright, 2 Ves. 25.

(h) Ex parte Whitbread, 2 Meriv. 101.

(1) A committee of a lunatic, by the equity of the statute (sess. 40. c. 251.) is entitled to an allowance for his services, in receiving and paying out moneys. Roberts' case, 3 Johns. Ch. Rep. 43.

Where the Lunatic's Property is small, balances have been ordered to be paid to the Committee on Affidavit, and without an Annual Account before the Master (i).

A Bill lies by the Attorney-General, on behalf of a Lunatic, against his Committee, for an Account of, and to secure, the Lunatic's Property (k).

The Committee of a Lunatic cannot make Leases, nor encumber the Lunatic's Estate, without leave of the Court (l).

By the 11 Geo. 3, c. 30, a Committee may, under the Authority of the Great Seal, renew Leases upon Lives, the fines payable upon such renewal to be applied as the Chancellor shall direct.

Where a Lunatic has an Estate for Life, or other Estate, with a power of granting Leases for Lives or years, such power may be executed by the Committee, under the direction of the Great Seal (m).

So, a Committee, under the direction of the Chancellor, may surrender Leases, in order to obtain Renewals for the benefit of the Lunatic; but such *renewed Leases operate to [*746 the same uses as the former Leases (n).

The Assets of a *Non Compos* after his death are distributable only by Bill (o). A Motion, therefore, by the Committee, after the death of the Lunatic, for a reference to ascertain his next of kin, in order that the Money in his hands might be distributed, was refused, such reference being proper only on a Bill filed against the Committee for an account of the Lunatic's Property (p).

If the Committee *misconducts* himself (q), or becomes *Bankrupt* (r), he will be removed; but Parties have been committed for reflecting in a Pamphlet upon the conduct of the Petitioners and others, acting in the management of the Affairs of a Lunatic, under Orders of the Court (s).

The Lunatic's Estate, though in *Ireland*, or *Scotland*, is under the Jurisdiction of the Chancellor (t).

In the management of the Lunatic's Estate, the benefit and comfort of the Lunatic, where no Creditor complains, is the great object of the Court (u), without looking to the interests of those who upon his death may have eventual rights of suc-

(i) *Picard ex parte*, 3 Ves. & Bea. 127.

(k) *Attorney-General v. Parnter*, 2 Dick. 748.

(l) *Foster v. Marchant*, 1 Vern. 262. See 43 Geo. 3, c. 75, s. 4.

(m) 43 Geo. 3, c. 75, s. 3.

(n) 29 Geo. 2, c. 31.

(o) *Wigg v. Tyler*, 2 Dick. 552.

(p) *Gilbert, ex parte*, 1 Ball. & Bea. 297.

(q) *Lloyd v. Mar*, 2 Dick. 460. *Ex parte Jones*, 13 Ves. 313.

(r) 1 Collinson, 313.

(s) *Ex parte Jones*, 13 Ves. 237.

(t) See *Ex parte Marchioness of Annandale*, Ambl. 80; but see contra as to *Ireland*, in the matter of *Duchess of Chandos*, 1 Sch. & Lefr. 301.

(u) *Dormer's Case*, 2 P. Wms. 266. *Ex parte Chumley*, 1 Ves. jun. 296. *Ex parte Baker*, 6 Ves. 8.

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747*] cession (x). (1). *The Chancellor administers the Lunatic's Estate *tanquam bonus pater familias* (y).

Formerly, the Chancellor could not, upon a Petition in Lunacy, order part of the Lunatic's *real* Estate to be sold for payment of his Debts, to prevent a Bill by Creditors (x); but a Committee may now, in pursuance of the Statute (a), order the Estate to be sold for that and other purposes (b), and at the discretion, and under the directions of the Great Seal, raise Money on a Mortgage of the Lunatic's Estate, for payment of Debts; but Money in the Funds will not, though under the control of the Chancellor, be applied in payment of the Lunatic's Debts (c), unless it be necessary for his accommodation (d). There is no instance of an Order on behalf of Creditors putting the Lunatic in a state of absolute want.

The Land-tax on a Lunatic's Estate has been ordered to be redeemed out of the produce of decaying Timber which had been ordered to be cut for the payment of Debts, under the Master's Report that it was for his benefit; and it was held there was no Equity for a charge upon the Estate in favour of the next of kin (e).

748*] A Lunatic was seised of an Estate, *A. ex parte Paterna*, and *ex parte Materna* of an Estate, *B.*, the latter being subject to a Mortgage. Timber cut upon *A.* was applied in discharge of the Mortgage upon *B.*; and on a question between the different Heirs, it was held that *A.* was not to be recompensed (e).

The residue of a Lunatic's Property beyond his Debts, will, on Petition, be ordered to be invested in a Government Annuity for his Maintenance, upon the Master's Report that it is for his benefit (f).

So, the Court may apply the personal Estate in payment of the Debts to any extent; and will take every advantage that tends fairly towards ordinary improvement, considering only the immediate Interest of the Proprietor; but, consistently with that, alteration of property is, as far as possible, to be avoided

(x) *Oxenden v. Lord Compton*, 2 Ves. jun. 70, and S. C. 4 Bro. C. C. 233.

(y) *Oxenden v. Lord Compton*, 2 Ves. jun. 70, and S. C. 4 Bro. C. C. 73.

(z) *Ex parte Smith*, 5 Ves. 656; and see *ex parte Dikes*, 8 Ves. 79.

(a) 43 Geo. 3. c. 75.

(b) See 1 Collinson on Idiots and

Lun. 284. *Ex parte Ludlam*, 1806. MS.

(c) Vid. 36 Geo. 3. c. 90, s. 3. This Act has been held not to extend to stock standing in the name of another, to which the Lunatic is entitled as Administrator. [*Ex parte Adams*, 2 Meriv. 112.]

(d) *Ex parte Hastings*, 14 Ves. 182.

(e) *Ex parte Phillips*, 19 Ves. 118.

(f) *Stonard, ex parte*, 18 Ves. 285.

(1) Vide *Salisbury's case*, 3 Johns Ch. Rep. 347. Whenever the interest of the lunatic seems to require it, the court will order timber to be sold, and the real estate of the lunatic to be converted into personal, and the personal into real estate. *Ib.*

(g), (1) and care taken that nothing extraordinary is attempted, as Estates bought, or Interests disposed of (h).

The Committee of a Lunatic's Estate is not authorized to purchase real Estate with Savings, and alter the nature of the Property; and Land so purchased will be considered as personal Estate (i). The Court will not permit any part of the Lunatic's Estate to be laid out in private Security (k).

There is no Equity between the real and the personal Representatives after the death of a Lunatic, to have property, which was altered by the Court, restored; therefore the produce of Timber on the *Estate of a Lunatic, cut and sold [*749 by Order, on a Report that it would be for his benefit, is personal Assets (l).

The Estate, as the Statute (m) provides, is to be preserved from Wastes; but that is to be understood with latitude; for repairs and payment of Mortgage Debts are not within it (n).

A Committee of the real Estate of a Lunatic may exercise the same power over it in regard to cutting Timber for repairs, as any discreet owner might do (o).

Money may be laid out in Improvements, if no good reason be shown why it should not (p). But in these cases the Committee acts at his peril, unless he has previously procured an Order of the Court (q), which it is always prudent to obtain.

If a Trustee of Money in the Funds be *non compos*, the Bank must transfer the same as the Court of Chancery or Exchequer shall direct (r); but a Lunatic abroad under a judicial proceeding in *Amsterdam*, in the nature of a Commission of Lunacy, is not within the provisions of the Act (s).

The Committee of a *Non Compos* may, under the directions of the Chancellor, complete the Contracts *or Engage- [*750 ments made when the Lunatic was of sound mind (a).

Debts (unless for necessities) contracted by a *Non Compos* are not binding; but are, if contracted before he was *non com-*

(g) See Ambl. 81. Ex parte Whitehead, 2 Meriv. 106.

(h) Ibid.

(i) Audley v. Audley, 2 Vern. 191. S. C. 1 Dick. 16.

(k) Ex parte Calthorpe, 1 Cox, 182.

(l) Oxenden v. Lord Compton, 2 Ves. jun. 69. S. C. on Petition. Ex parte Bromfield, 1 Ves. jun. 453. Same Cases reported, 3 Bro. C. C. 510. 4 Bro. 231.

(m) 17 Edw. 2, c. 10.

(n) Ex parte Grimstone, see 2 Ves. jun. 75, in note. S. C. Ambl. 708. 4 Bro. C. C. 238.

(o) 2 Atk. 407.

(p) 2 Ves. jun. 75, in note; and see *Sergeson v. Sealy*, 2 Atk. 413; but see 1 Vern. 263.

(q) See 10 Ves. 104; and ex parte Hilbert, 11 Ves. 397.

(r) *Sylva v. Da Costa*, 8 Ves. 316.

(s) 36 Geo. 3. c. 90, s. 1.

(a) 43 Geo. 3. c. 75, s. 1.

pos; and an Action may be brought against him, and his Person taken in Execution (*b*).

The Creditors of a *Clergyman, non compos, may sequester his Living* (*c*); and a Creditor may take Leasehold Property of the Lunatic in Execution, and the Chancellor cannot restrain it (*d*).

The Tenant of a Lunatic's Estate may be restrained, on Petition, from committing Waste, though no Bill be filed (*e*) (*1*).

Neither the Lunatic, nor his Committee, can present to a vacant Benefice, but the Chancellor presents (*f*); and, usually, to a Relation of the *Non Compos* (*g*).

If a *Feme Covert* be a Lunatic, her husband is bound to maintain her, though she has a separate Estate, if he is of ability (*h*).

In case a Visitor of a charitable Institution becomes *non compos*, the Visitation Authority devolves *upon the crown to be exercised by the Chancellor (*i*).

Formerly, it seems, the Committee of a *Non Compos* could not, in any case, grant Copyholds, he having no Estate in the Manor; but, singular as it may appear, the *Non Compos* might, by his Steward, make such Grants, according to the Custom of the Manor (*k*); and now by the Statute, 43d Geo. 3, c. 75, the Copyhold Estates of Persons found Lunatic, or of unsound Mind, may, under the directions of the Great Seal, be sold, charged, or encumbered, by way of Mortgage, or otherwise, as shall be deemed most expedient for raising such Sums of Money as shall be necessary for the Payment of their Debts, or performance of their Contracts or Engagements; and a power is given to grant Leases, under the directions of the Great Seal.

A *Non Compos*, it has been determined, may be Steward of a Manor, and as such, Grant Copyhold Estates (*l*).

If a Lunatic be a Trustee of *Stock*, and refuses to transfer, a Transfer may be ordered in pursuance of a late Statute (*m*);

(*b*) See 1 Collinson on Idiots and Lun. 376; and 13 Ves. 590, there cited. There have been many deplorable instances of Lunatics confined for debt. Surely, on behalf of the Lunatic, as well as for the security of his fellow Prisoners, he ought to be separated from them, and have medical attendance.

(*c*) 14 Ves. 182.

(*d*) Ex parte Dikes, 8 Ves. 81.

(*e*) In the matter of Creagh, a Lunatic, 1 Ball & Bea. 108.

(*f*) 3 Bac. Abr. 295. Wing Entr.

629. In the matter of Fitzgerald, 2 Scho. & Lefr. 437.

(*g*) See 1 Wooddeson's Lect. 409.

(*h*) Brodie v. Barry, 2 Ves. & Bea. 39.

(*i*) 1 Collins. Idiots and Lun. 363; and Attorney-General v. Dixie, 13 Ves. 519; and ex parte Bosworth School, ib. 535, there cited.

(*k*) Blewitt's case, Leon. 47, cit. 1 Collinson, 454.

(*l*) Mir. c. 2, s. 20, Shepherd G. 115. Bryd. 99, cited 1 Collinson on Idiots and Lunatics, 455.

(*m*) 36 Geo. 3. c 90, s. 1.

(1) Vide *Hallock's case*, 7 Johns. Ch. Rep. 24.

nor is it necessary, in order to obtain relief under this Act, that the Lunacy should be found by Inquisition, if otherwise made apparent (n).

*If a Charge on a Lunatic's Estate falls in to him as [*752 Representative to his Sister, it sinks for the Benefit of the Heir(o).

The Chancellor may alter or discharge an Order of his Predecessor (p).

An Order does not abate by the Lunatic's death, but any Party may still prosecute it, and procure the Masters' Report (q); and Orders in Lunacy may be made after the death of the Lunatic, upon a Report made, or Petition presented, previous to the Lunatic's death (r).

The Chancellor has refused access to a Lunatic by a Person entitled upon the death of the Lunatic, in default of an appointment by her, to see whether she was in a state to exercise the power. There is no instance of an Order for access to the Lunatic upon the principles of *quia timet* (s).

By the 15th Geo. 3, c. 30, it is provided, that the Marriage of a Person duly found a Lunatic shall be null and void, unless he be previously declared sane by the Lord Chancellor, or his Trustees; but it seems necessary that the Marriage of a Lunatic should be declared void by a sentence of the Ecclesiastical Court (t). A Person marrying a *Non Compos*, the Custody of whom has been consigned to a Committee, is a Contempt of Court (u); and Persons accessory *to such Marriage, [*753 would, it seems, be ordered to attend the Court, and on refusal committed (u).

It is not within the Plan of this Work to consider the doctrines of the Common Law respecting Idiots or Lunatics; for these, the Reader is referred to the Common Law Writers. Their liability in civil and in criminal cases is copiously treated of in those writers. With a few observations, therefore, we shall close this subject of the Chancellor's Jurisdiction.

If an Action for Debt is brought by a Lunatic, the Creditor may Petition for a Commission of Lunacy, and all legal proceedings will be staid, on payment of the Money into Court (x).

(n) *Sims v. Naylor*, 4 Ves. 360, overruling, it seems, the doctrine in *ex parte Gillham*, 2 Ves. jun. 587.

(o) *Lord Compton v. Oxendon*, Bart. 4 Bro. C. C. 397. S. C. 2 Ves. jun. 261.

(p) *Lord Annandale's Case*, 4 Bro. C. C. 235. *Ludlum's case*, mentioned in 1 *Collinson*, 104.

(q) *Ex parte Armstrong*, 3 Bro. C. C. 236.

(r) *Ex parte Grimston*, Amb. 706. *Ex parte M'Dougal*, 12 Ves. 384.

(s) *Ex parte Lyttleton*, 6 Ves. 7.

(t) *Ex parte Turing*, 1 Ves. & Bea. 140.

(u) *Ashe's case*, Pre. Ch. 263. Eq. Cas. Abr. 278.

(v) *Stuart v. Taylor*, 9 Mod. 96. This was the case of an Idiot, but the same doctrine seems applicable, in principle, to a Lunatic.

(x) 1 *Collinson's Idiot and Lun.* 341.

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Suits may be instituted in Equity on the behalf of a *Non Compos* (y).

So, Suits may be brought against a *Non Compos* (1). The mode in which the answer must be put in, in such case, has before been adverted to (z).

It seems that a Lunatic cannot plead his Lunacy, either at Law (a), or in Equity (b); but after an Inquisition found, his Committee may; and in a Suit by him and the Lunatic may avoid his acts from the time he is found to have been *non compos* (c). In some cases the Lunatic has not been allowed to be 754*] a Party to a Suit, to be relieved against an act done "during his Lunacy (d), as it would have the effect of stultifying himself; but it has been held he may be a Party to a Suit to enforce the performance of an Agreement entered into prior to his Lunacy (e), to which no such objection was applicable; and the better opinion seems to be, that a Lunatic may be a Party to a Bill by his Committee, to set aside acts done during his Lunacy (f); but that he cannot, without his Committee, file a Bill, or if he does, it may be demurred to, if the Lunacy appears on the face of the Bill (g), or pleaded to, if it does not so appear (h).

Instruments of Record executed by a Lunatic cannot be set aside at Law, though a Court of Equity would afford relief (i). If by an oversight of a Judge he is permitted to levy a fine (k),

(y) Attorney-General v. Tiler, 1 Dick. 378.

(z) Ante, p. 261.

(a) See Stroud v. Marshall, Cro. Eliz. 298, U. 4; and Cross v. Andrews, ib. 622.

(b) See 1 Collinson's Idiot an Lun. 402. Beverley's Case, 4 Co. 124. 1 Fonbl. Eq. 48, n. (E.) Sed vid. Yates v. Boen, 2 Str. 1164.

(c) Clarke v. Clerk, 2 Vern. 412. Addison v. Dawson, 2 Vern. 678, cited, 1 Fonbl. Eq. 48, n. (E.)

(d) Attorney-General on the part of Smith v. Packhurst, 1 Ch. Cas. 11b.

(e) Attorney-General v. Woolrich, 1 Ch. Ca. 153.

(f) Ridler v. Ridler, Eq. Cas. Abr. 279. See on this subject, Co. Lit. 2b.

(g) See ante, p. 292.

(h) Ante, 305.

(i) Tith. 42. 2 Vern. 678.

(k) 4 Co. 124. Anon. 4 T. R. 306.

(1) The creditors of a lunatic must apply for relief to a court of chancery, which has the sole custody and disposal of his real estate, and not to a court of law. *Brusher's Exrs. v. Cortlandt*, 2 Johns. Ch. Rep. 400. The real estate of a lunatic may be sold for the payment of debts, on a bill filed by a creditor, without a petition by the committee, under the act relating to idiots and lunatics; but the sale must be conducted under the directions of the court, by a master, and the committee of the lunatic; and their report must be presented to the court for its approbation, before the conveyance is executed. *Ib.* A creditor of a lunatic may file a bill for the payment of his debt, against the committee of a lunatic, without making him a party. *S. C.* 2 Johns. Ch. Rep. 242. Where a creditor seeks to obtain payment of his debt out of a lunatic's estate, and no inventory of the estate has been filed by the committee, according to the Statute, the proper course is, to cause the committee, by citation, or otherwise, to file an inventory, and thereupon, to present a petition to the court, stating the amount of the estate, debts, &c. *Ib.*

or to suffer a recovery, they will be valid (*l*) ; because it is certified on the credit of the Judge that he is a perfect and able Person (*m*). Such Fine or Recovery is therefore conclusive Evidence, not only of the act done, but of the capacity of the Person doing it (*n*) ; but if a Tenant to the *præcipe* be made by deed (*o*), or if the Party appear by Attorney (*p*), unless it be under a Letter of Attorney *acknowledged before a Judge* (*q*), the recovery might be set aside ; for a *Lunatic cannot execute [*755 a Deed, or appoint an Attorney (*r*). *Brydall* puts the question, whether a King, during the time of his insanity, is capable of making peace, and relies on the opinion of Grotius in the negative (*s*).

In general, a *Will*, by one, *non compos*, is bad ; but a devise by a Lunatic to *charitable Uses*, (singular as it may appear) has been considered as effectual under the saving words in that statute (*t*). These, however, are mere points of Law, on which we are not called upon to dilate.

Though at Law, and in general, in Equity, every act of the Lunatic subsequent to the period at which he is proved to be a Lunatic, is void, according to the maxim, *furiosus nullum negotium gerere potest, quia non intelligit quod agit*, yet a Court of Equity has refused to enter into the consideration of a party's sanity, to impeach a Conveyance made by such party, after a lapse of twenty years, and two subsequent purchases (*u*) : so, also, a Court of Equity, owing to the great inconvenience, will not assist a party in giving effect to the legal consequence of lunacy, by setting aside contracts or dealings in the course of his *Trade* (*x*). The interference, however, of Courts of Equity, in Cases of this description, depends upon the circumstances of each Case, and no general rule, it has been said, can be laid down (*y*).

*Agreements made by a sane person will not be affected by subsequent insanity, but will be specifically enforced (*z*).

All acts done during a lucid interval are valid. Many questions have arisen upon the execution of Wills during lucid intervals ; and the intervals having been proved, the Wills have been held valid. The validity of Wills under such circumstances must materially depend on the reasonableness of the Will, and on the circumstances of the attestation (*a*). The law is the same with respect to contracts, or any other disposition of

(*l*) See 10 Co. 42.

(*m*) Hob. 224.

(*n*) See *Ridgw. Parl. Cas.* 79, 260.

(*o*) 3 Atk. 312. 2 Ves. 403.

(*p*) 4 Co. 124. 3 Atk. 112.

(*q*) *Hume v. Burton*, 1 *Ridgway's Parl. Cases*, 16.

(*r*) See these Cases fully stated, 1 *Collinson on Id. and Lun.* 413, &c.

(*s*) *De Jur. Bell. et Pac. Lib.* 1,

c. 3, s. 24. *Lib. 3. C.* 20. *Brydall's Law, of Id. and Non Compos*, p. 90.

(*t*) *Collinson's Case*, Hob. 136 ; see *vid. Duke's Charit. Uses*, 78, 110.

(*u*) *Winchcombe v. Hall*, 1 Ch. Rep. 22. *contra* ; *Squire v. Pershall*, 8 Vin. Abr. 334.

(*x*) *Niel v. Morley*, 9 Ves. 478.

(*y*) *Ibid.*

(*z*) *Owen v. Davis*, 1 Ves. 82.

property. An absolute Conveyance made in a lucid interval is valid.

If, however, general Lunacy is established, it is necessary for the party wishing to enforce a Contract to show, that it was executed in a lucid interval ; and if lunacy be objected to the performance of a Contract, an Issue will be directed to ascertain, whether the Defendant was a Lunatic at the time of the execution of the Contract ; and if so, whether he had lucid intervals, and whether the Contract was executed during a lucid interval (b).

Where a party has been subject to a Commission, or to any restraint permitted by Law, even a domestic restraint, clearly and plainly imposed upon him, in consequence of undisputed insanity, the proof, showing sanity, is thrown upon him : on the other hand, where insanity has not been imputed by relations or friends, or even by common fame, the proof of insanity, which 757*] does not appear to have ever existed, is *thrown upon the other side, which is not to be made out by rambling through the whole life of the party, but must be applied to the particular date of the transaction (c).

Where the question is of a Fact done *lucido intervallo*, which may be either by remission or intermission, it is not enough to show that the Act was *actus sapientis conveniens*, for that may happen many ways, but it must be proved to be *actus sapientis*, and to proceed from judgment and deliberation, otherwise the presumption continues (d).

(a) *Levy v. Lindo*, 3 Meriv. 85.

(b) *Hall v. Warren*, 9 Ves. 605.

(c) *Vid. White v. Wilson*, 13 Ves.

88, 9 ; and see *Attorney-General v. Parther*, 3 Bro. C. C. 442.

(d) *Co. Litt.* 246b, n. 1, from Lord Nott's MSS.

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NOTE.—It was found impracticable to refer to every particular Proposition contained in the foregoing Work, unless by such an extension of the Index as might be deemed inconvenient; but whatever points are thus omitted will easily be found in the Work, under the general heads to which they relate. If any leading Case on any point inquired after is remembered, by turning to that Case in the Index of the Names of Cases prefixed to the First Volume, the Reader will be referred to the subject at once, without any further Index. That, indeed, was the principal inducement to prefix the Names of the Cases.

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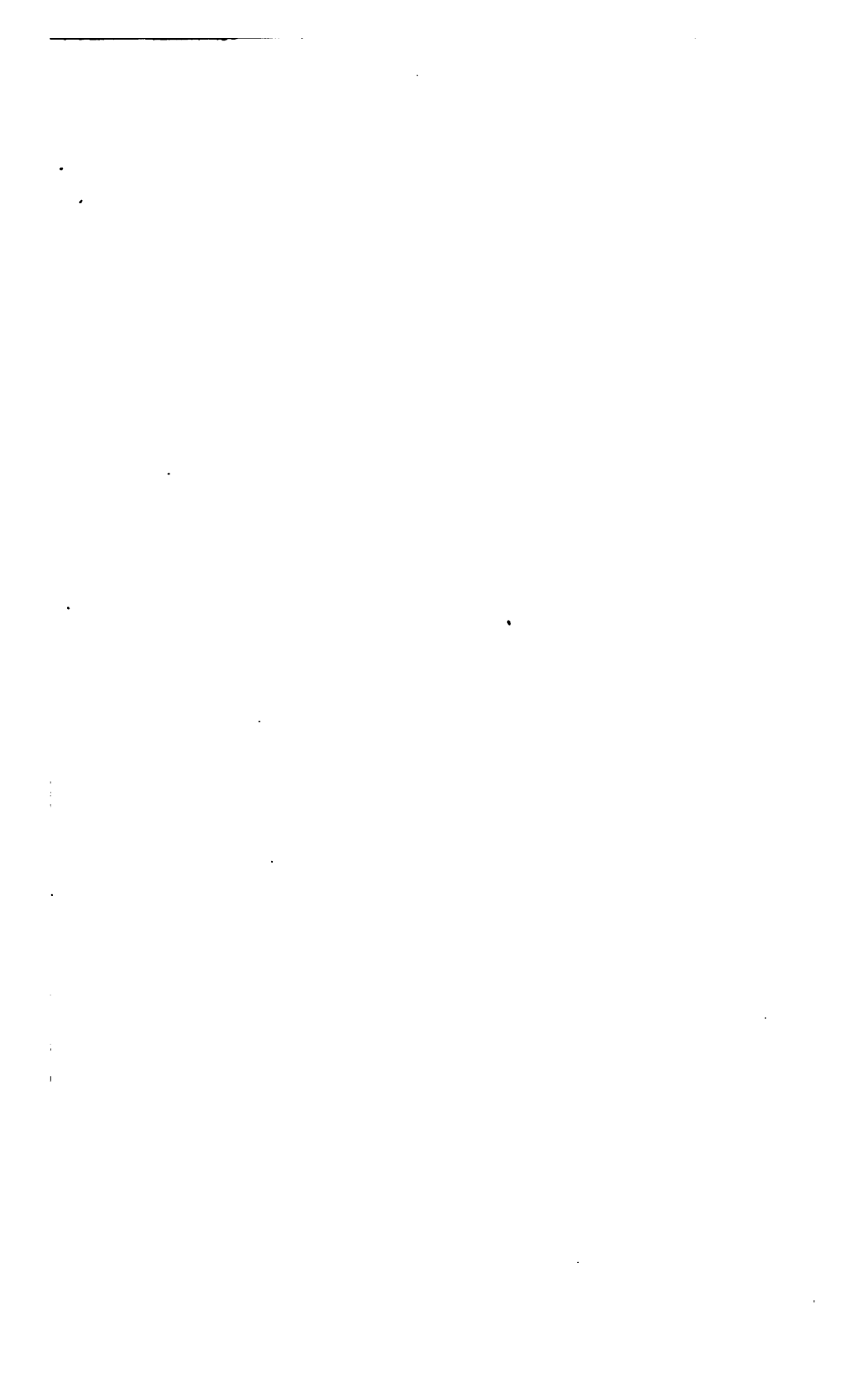
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